The Advocate

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Ky OPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

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FROM THE EDITOR...

Ed Monahan

New Leaders. Kentucky's statewide public defender program is an independent agency within the Executive Branch. Through the Governor's Reorganization, public advocacy is now organizationally with the Public Protection Department headed by James Adams and within the Environmental and Public Protection Cabinet. LaJuana S. Wilcher is Secretary of the Cabinet. She did criminal defense work and appointed public defender work in Bowling Green, KY. In this issue, we feature Commissioner Adams and Secretary Wilcher and Kentucky's new criminal justice leaders.

Drug Policy. Take advantage by providing input into the Drug Summit's work.

Kentucky's Racial Justice Act. Senator Neal, the leader of its legislative enactment, tells us its history, its meaning and its promise.

Reliable Statements. Electronic recording of statements is being considered by our General Assembly. There are practical reasons for its adoption.

Subpoenas. The KBA has issued a major ethics opinion on the use of subpoenas. As defenders we know there are significant abuses of the power of subpoenaing. Take note of the new ethics opinion and Scott West's excellent article on subpoena practice.

***Brady*.** Nationally known defender educator Ira Mickenburg helps us understand the need for vigorous *Brady* advocacy.

In the Spotlight. We feature Kimberly Boyd for her dedicated work for our clients.

Annual Defender Education. Our 32nd Annual Public Defender Conference approaches. Mark your calendars with the dates: June 22-23, 2004. It will be at the Holiday Inn North, Lexington. It is the largest yearly gathering of criminal defense specialists.

Ed Monahan
Deputy Public Advocate

LaJuana Wilcher Appointed Environmental and Public Protection Cabinet Secretary

On Dec. 22, 2003 Kentucky's secretary of the newly constituted Environmental and Public Protection Cabinet (EPPC) was sworn in. LaJuana Wilcher, 49, of Bowling Green, was selected by Gov. Ernie Fletcher to take the state's top environmental position. She is a biologist and environmental lawyer with almost three decades of experience in environmental and natural resources issues. She began her career with the U.S. National Park Service, served in President Reagan's Administration, and was nominated by President George H.W. Bush to be Assistant Administrator for Water at the U.S. Environmental Protection Agency (EPA). During Wilcher's time in Washington D.C., she managed EPA's national water programs, including planning, policy and program management for the nation's drinking water, wastewater, ground water, oceans and estuaries. Ms. Wilcher also was responsible for EPA's wetlands program, managed EPA's negotiations on the $1.1 billion Exxon Valdez oil spill settlement, and led U.S. delegations to international water conferences and events. Before being selected by Gov. Fletcher, Wilcher was with the English, Lucas, Priest & Owsley law firm in Bowling Green. In private law practice, Ms. Wilcher advised companies, municipalities, small businesses and not-for-profit organizations on a range of environmental and natural resource issues. She also serves as an adjunct professor of environmental law courses at Vermont Law School. Wilcher received a Biology degree from Western Kentucky University, then a law degree from the Chase College of Law at Northern Kentucky University. In addition to her work at EPA, Wilcher also served as a special assistant to the general counsel at the U.S. Department of Agriculture, and as a naturalist for the U.S. National Park Service at Mammoth Cave National Park. ■

LaJuana S. Wilcher

James Adams Appointed Public Protection Commissioner

Environmental and Public Protection Cabinet Secretary LaJuana S. Wilcher appointed James L. Adams, of Louisville, as the commissioner for the cabinet's Department of Public Protection .

Adams, vice president for CSX Transportation in Louisville, was responsible for Government and Community Relations in Kentucky from March 2002 to January 2004. As a commissioned officer with the U.S. Coast Guard from 1986 to 1992, Adams' assignments included serving as a congressional liaison with the U.S. House of Representatives. He later worked as a legislative assistant for the U.S. House of Representatives from 1992 to 1995. Adams then served as assistant vice president of public affairs for American Commercial Barge Line, from 1995 to 2002.

The Public Protection Department encompasses eleven of Kentucky's consumer protection regulatory agencies, including the Offices of Insurance and Financial Institutions, the Public Service Commission, and the Office of Housing, Buildings, and Construction, and Public Advocacy.

"Jim Adams brings a wealth of experience to the cabinet with a proven record of public service," Wilcher said. "Jim's corporate, congressional and service background provides the cabinet with a commissioner skilled in working with diverse groups to achieve common goals in the public interest."

James L. Adams

"Jim's leadership in business and government will serve the cabinet well," said Michael Hagan, retired Chief Executive Officer, American Commercial Barge Line.

By executive order Gov. Ernie Fletcher combined the Labor, Public Protection and Regulation Cabinets and NREPC into a single cabinet in January 2004. ■

NEW KY CRIMINAL JUSTICE LEADERS

Stephen B. Pence

Stephen B. Pence, Lt. Governor

Stephen B. Pence was born in Louisville, Kentucky on December 22, 1953. Steve received a Juris Doctor from the University of Kentucky in 1981, and graduated with Bachelor of Science (1976) and MBA degrees (1978) from Eastern Kentucky University. Steve began his career as a public school teacher in Jefferson County teaching 6th and 8th grade math. After law school, Steve worked as an assistant attorney general of Kentucky from 1981-1982. In the early 1990s, he was a lead attorney in BOPTROT, the investigation to uncover and eliminate corruption in state government. He was formerly a partner with the *Pedley, Zielke, Gordinier and Pence* law firm (1995-2001). Steve was appointed by President George W. Bush as the United States Attorney for the Western District of Kentucky and was confirmed to this position on September 24, 2001. As U.S. Attorney, he supervised over 30 attorneys and 40 support staff. Following the events of September 11th, Steve established and led the Anti-Terrorism Task Force (ATTF) in Kentucky. Additionally, he expanded and led the Project Safe Neighborhoods (PSN) program, fought illegal drugs and trafficking and investigated Medicare and Medicaid fraud issues. Steve has also served his country in the United States Army. From 1982-1987 he served active duty in the JAG Corps and was stationed in the Federal Republic of Germany. He continues to serve as Lieutenant Colonel (Military Judge) in the United States Army Reserve JAG Corps. In 1995, Steve received the Kentucky Bar Association's "Outstanding Lawyer" award. He lives in Louisville and is married to Ruth Ann Cox. He has five children, Eileen, Kay, Peter, Joseph and Paige.

C. Cleveland Gambill

C. Cleveland Gambill, Deputy Secretary, Justice and Public Safety Cabinet

C. Cleveland "Cleve" Gambill is the deputy secretary for the Justice and Public Safety Cabinet and will work closely with Lt. Gov. Stephen B. Pence, who is also secretary of the cabinet. Gambill has 13 years experience as an Assistant U.S. Attorney in both the Western and Eastern Districts of Kentucky. Between 1983 and 1984 he served as Chief of Litigation in the Surface and Mining Division of the U.S. Department of the Interior and has spent the past 12 years serving as U.S. Magistrate-Judge for the Western District of Kentucky. He also served in the United States Army between 1969 and 1972 where he was a special agent in the Pentagon counterintelligence Force. Gambill holds a Bachelors Degree from Transylvania University, a Masters Degree in Public Administration from George Washington University and a Law Degree from Duke University.

Joseph M. Whittle

Joseph M. Whittle, Executive Director, Office of Legal Services, Justice and Public Safety Cabinet

Joseph M. Whittle has been appointed as the executive director for the newly formed Office of Legal Services for the Justice and Public Safety Cabinet. This office is a result of the cabinet reorganization and will bring efficiency to legal services for the cabinet. Attorneys who formerly were housed within the various departments will be a cohesive unit focusing on legal services and development of legislation, regulation and policy. Whittle comes to state government with a varied background in private practice, local and federal government. Most notably, Whittle was the U.S. Attorney for the Western District of Kentucky from 1986 to 1993 where he was instrumental in Operation BOPTROT, an investigation and prosecution of corruption in state government. Prior to joining the Fletcher administration, Whittle was a partner in the Louisville firm of *Pedley, Zielke, Gordinier and Pence* from 1995 to 2003. His career encompasses that of Grayson County Attorney and attorney advisor for the U.S. Army Corps of Engineers. He also was an officer in the Army Judge Advocate General's Corps and served as German Claims Commissioner from 1957 to 1959. A native of Brownsville, Whittle attended Transylvania University in Lexington and Washington University in St. Louis and received his law degree from the University of Louisville. Whittle has received numerous honors including the Outstanding Kentucky Lawyer of the Year Award in 1993.

John Rees

John Rees, Commissioner, Department of Corrections

John Rees was appointed commissioner of the Department of Corrections on January 13, 2004. Most recently Rees was self-employed as a consultant providing services for corrections and criminal justice administration. In 1969 Rees began his career in corrections at the Kentucky State Reformatory as an assistant casework supervisor. Three years later, he was promoted to the position of director of the Division of Special Institutions with the former Kentucky Bureau of Corrections. He served in several capacities within the Kentucky Corrections system until 1976 when he left the state to work for the Oklahoma Department of Corrections. He returned to Kentucky in 1980 to become warden of the Kentucky State Reformatory, a position he held for six years. From 1986 to 1998, Rees worked for Corrections Corporation of America, a private correctional management firm. He managed facilities in New Mexico, Texas, Louisiana and Tennessee before becoming vice president of business development. Rees received a bachelor's degree

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in Sociology and Political Science from the University of Kentucky and a master's degree in Criminology and Correctional Administration from Florida State University. Rees has maintained professional memberships with state and national correctional associations. In 2003 he was named a Certified Corrections Executive by the American Correctional Association. In addition he has taught corrections programs at several universities, the National Institute of Corrections and the National Institute of Justice.

Mark Miller

Mark Miller, Commissioner, Kentucky State Police

Mark Miller received his Bachelor of Arts Degree in Psychology from the University of Louisville in May 1979 and his Juris Doctor Degree from the University of Louisville School of Law in May 1984. He has also attained numerous honors including Co-Chairman of Criminal Section of the Louisville Bar Association in 1990 and President of the Kentucky Academy of Justice in 1994. Mark Miller served as United States Attorney from September 2003 to December 2003, had previously served as Chief of the United States Attorney's Criminal Division for the Western District of Kentucky from November 2001 to September 2003 and was Assistant United States Attorney from September 1990 to November 2001. In addition to his service with the United State's Attorney's office, Mark Miller also serves as a Major in the Judge Advocate General's Corp, 139th LSO and is Commander of a team of Judge Advocates responsible for providing legal services, training and representation to the members of the 81st Reserve Support Command in seven states.

Greg Howard

Greg Howard, Commissioner, Department of Vehicle Enforcement

As a result of Gov. Ernie Fletcher's reorganization of state government, the Division of Motor Vehicle Enforcement will be transferred from the Kentucky Transportation Cabinet to the Justice and Public Safety Cabinet. Greg Howard will assume the position of commissioner of the Department of Vehicle Enforcement once the transfer is completed. Currently, he is already on board serving as division director. Howard's experience includes a distinguished career in law enforcement and work in the private sector as the assistant director of special projects for Lockmasters Security Institute in Nicholasville, KY. He retired as a captain of the Lexington-Fayette Urban County Division of Police in 1996 and moved on to the Justice Cabinet's Department of Criminal Justice Training (DOCJT) in Richmond. From 1996 to 2003, Howard served in several capacities at DOCJT including law enforcement instructor, basic training supervisor, and training support and operations director. Howard received a bachelor's degree in Criminal Justice/Police Administration in 1990 and a master's degree in loss prevention and security in 2003, both from Eastern Kentucky University. He also received specialized training from the FBI National Academy in Quantico, VA. Howard is the current president of the Kentucky Law Enforcement Memorial Foundation and maintains professional memberships with state and national law enforcement associations. He has received numerous awards and recognitions throughout his career. ■

There Has Been a Steep Decline in Violent Juvenile Crime

- Nationally, the FBI has reported that in 2001 the Juvenile Violent Crime Index arrest rate declined for the seventh consecutive year.
- Juveniles accounted for 17% of all arrests and 15% of all violent crime arrests in 2001. This rate is 44% lower than its peak in 1994 and the lowest it has been since 1983.
- Between the mid-1980s and 1993, juvenile arrests for murder more than doubled.
- From its 1993 peak through 2001, the juvenile arrest rate for murder has decreased 70%.
- In 1993, there were about 3,800 juvenile arrests for murder.
- In 2001, there were 1,400 juvenile arrests for murder.
- In 1993, arrests of juveniles accounted for 10% of all murders cleared by arrest.
- In 2001, arrests of juveniles accounted for 5% of all murders cleared by arrest.
- 48% of juveniles arrested for murder in 2001 were African-American.

Source: OJJDP Juvenile Justice Bulletin, Juvenile Arrests 2001, December 2003.
<http://www.ncjrs.org/html/ojjdp/201370/contents.html>

Lieutenant Governor Stephen Pence Leads Drug-Control Assessment Summit Team

Lt. Gov. Stephen B. Pence announced February 6, 2004 the 50-member team of state, local and federal officials who will spend 20 weeks assessing Kentucky's substance abuse issues as part of Gov. Ernie Fletcher's Statewide Drug Control Policy Summit Initiative.

"We've assembled a stellar group of people for this assessment," Pence said. "They are each knowledgeable in their field and are going to work to provide us with the information we need to do something about the drug problems in our Commonwealth."

Summit members, who specialize in drug prevention-education, treatment and law enforcement, will conduct the first-ever collaborative evaluation of the state's substance abuse problem, examining it in each of those areas. They will concentrate on illegal drugs, inappropriate prescriptions for medications and youth alcohol and tobacco use.

The group will offer recommendations to the governor on establishing Kentucky's first statewide drug-control policy. It will be designed to produce greater, measurable results in reducing illegal drug trafficking and abuse, and eliminate duplication and gaps in services, ensuring that the state makes the best use of its resources.

Total funding for the assessment is $160,000, none of which will be from the General Fund. The Kentucky State Police and the Kentucky Department of Vehicle Enforcement each contributed $75,000 in Asset Forfeiture Funds, which is money seized from drug traffickers and forfeited by courts to KSP and KVE. U.S. Attorney **Greg Van Tatenhove**, chairman of the Appalachia High Intensity Drug Trafficking Area's (AHIDTA) executive board, announced that AHIDTA will also provide $10,000 in funding to the Summit. Funds remaining at the conclusion of the assessment will be returned.

For more information about the drug-control initiative, visit the Kentucky Drug Summit Web site at <http://kydrugsummit.ky.gov/>.

The Summit consists of three panels: **Prevention-Education**, **Treatment** and **Enforcement**. Some officials have been assigned to more than one panel.

By panel, the Summit members and the organizations they represent are:

Enforcement Panel

Co-chair Greg Stumbo, Kentucky Attorney General
Co-chair - Cleve Gambill, Deputy Secretary, Justice and Public Safety Cabinet
Keith Cain, Daviess County Sheriff; President, Kentucky Sheriffs' Association
Van Ingram, Maysville Police Chief President; Kentucky Association of Chiefs of Police
Lt. Col. Rodney Brewer, Acting Deputy Commissioner, Kentucky State Police
John Bizzack, Commissioner, Kentucky Department of Criminal Justice Training
Rod Maggard, Director, Rural Law Enforcement Technology Center
Gale Cook, President, Kentucky Commonwealth Attorneys Association
Harold Johns, President, Kentucky County Attorneys Association
Maj. Gen. Donald Storm, Kentucky Adjutant General
William Walsh, Chair, Kentucky Law Enforcement Council and Director, Southern Police Institute
Greg Howard, Commissioner, Kentucky Department of Vehicle Enforcement
Frank Rapier, Cirector, High Intensity Drug Trafficking Alliance (HIDTA)
Karen Engle, Director, Operation UNITE
Joseph Lambert, Chief Justice, Kentucky Supreme Court, Administrative Office of the Courts
Stephen Horner, Commissioner, Kentucky Alcoholic Beverage Control
Connie Payne, Manager, Kentucky Drug Court
George Moore, Commonwealth's attorney, based in Mount Sterling
Gary Oetjen, acting special agent in charge, U.S. Drug Enforcement Administration, Louisville
Greg Van Tatenhove, U.S. attorney, Eastern District
David L. Huber, U.S. attorney, Western District
Terry Anderson, Marshall County Sheriff; director, Tri-County Drug Task Force, drug task forces
Dr. Tracey Corey, Kentucky Medical Examiner's Office

Treatment Panel

Chair - Karyn Hascal, Acting Director, Division of Substance Abuse, Department for Mental Health and Mental Retardation
Rice Leach, Commissioner, Kentucky Department of Public Health
John Rees, Commissioner, Kentucky Department of Corrections
Ron Bishop, Commissioner, Kentucky Department of Juvenile Justice
James Kemper, Franklin County Jailer; President, Kentucky Jailers' Association
John Coy, Chairman, Kentucky Parole Board
Dr. Danny Clark, President, Kentucky Board of Medical Licensure
David Sallengs, Branch Manager, Drug Enforcement, Kentucky Department of Public Health
Dr. Andrew Pulito, President, Kentucky Medical Association
Dan Howard, Director, Kentucky Association of Mental Health/Mental Retardation Programs
Louise Howell, Director, Kentucky River Community Care
Robert Walker, UK Center on Drug and Alcohol Research
Dr. Rick Purvis, Director, Division of Mental Health, Kentucky Department of Corrections
Drexel Neal, Acting Director, Division of Community Corrections, Lexington-Fayette Urban County Government
Chris Block, Program Administrator, Office of Alcohol and Other Drug Abuse Programs, Kentucky Department of Corrections

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Ernie Lewis, Kentucky Public Advocate

Prevention-Education Panel

Chair -Tim Eaton, Superintendent, Pulaski County Schools
John Rees, Commissioner, Kentucky Department of Corrections
Ron Bishop, Commissioner, Kentucky Department of Juvenile Justice
Mardi Montgomery, Kentucky Deputy Secretary of Education
Van Ingram, Maysville police chief; president, Kentucky Association of Chiefs of Police
Carl Leukefeld, UK Center on Drug and Alcohol Research
Keith Cain, Daviess County Sheriff; President, Kentucky Sheriffs' Association
D.G. Mawn, Acting Director, Kentucky Agency for Substance Abuse Policy
James Kemper, Franklin County jailer; President, Kentucky Jailers' Association
Stephen Horner, Commissioner, Kentucky Alcoholic Beverage Control
Carol Roberts, Executive Director, Kentucky ACTION (Alliance to Control Tobacco)
Jon Akers, Executive Director, Kentucky Center for School Safety
Steve Kirby, Attorney, Kentucky School Board Association
Robert Biggin, Associate Chair, Counseling and Educational Leadership Department, Eastern Kentucky University
Sylvia Lovely, Director, Kentucky League of Cities
Dianne Shuntich, Assistant Director, Division of Substance Abuse, Department for Mental Health and Mental Retardation
Brigette Stacy, Division of Student, Family and Community Support Services, Kentucky Department of Education

Opportunity to Provide Your Perspective. The group is collecting information from the public through public forums and by using an online questionnaire. It will be helpful to the group to hear our opinions on these issues. Below is the link to the Drug Summit web page. <http://kydrugsummit.ky.gov/index.asp> You will want to fill out the Public Input Electronic Questionnaire http://kydrugsummit.ky.gov/pub_login.asp at http://kydrugsummit.ky.gov/pub_login.asp It should take you 15-20 minutes.

All Full Summit Membership Meetings

All location information is provided by: **http://www.mapquest.com/http://www.mapquest.com/**

Location:
Frankfort at the Kentucky Higher Education Assistance Authority–Conference Room, 100 Airport Road

Dates/Times:
February 12, 2:00pm; March 10, 11:00am; April 7, 11:00 am; May 5, 11:00am; and June 9, 2004, 11:00am.

Public Input Meetings

North & North East

Covington
Date and Location:
February 18, 2004, 1-5pm,
Northern Kentucky Convention Center
One West Rivercenter Blvd.

Maysville
Date and Location:
February 25, 2004, 1-5pm,
Maysville Community College
Fields Auditorium, 1755 U. S. 68

Ashland
Date and Location:
March 4, 2004,1-5pm,
Ashland Plaza Hotel
1 Ashland Plaza

South & South East

Pikeville
Date and Location:
March 8, 2004, 1-5pm
Landmark Inn
190 S Mayo Trl

Prestonsburg
Date and Location:
March 9, 9-2pm,
Jenny Wiley State Park
75 Theatre Court

Hazard
Date and Location:
March 16, 2004, 1-5pm,
Hal Rogers Law Enforcement Technology Center, 101 Bulldog Lane

Somerset
Date and Location:
March 17, 2004: 9-2pm
Rural Community Center
2292 S Highway 27

West

Paducah
Date and Location:
March 23,2004, 1-5pm,
J.R.'s Executive Inn
One Executive Blvd

Hopkinsville
Date and Location:
March 24, 2004, 9-2pm,
Hopkinsville Convention Center

Owensboro
Date and Location:
March 30, 2004, 1-5pm,
Executive Inn Rivermont
One Executive Blvd.

Henderson
Date and Location:
March 31, 2004, 9-2pm,
Wolf Banquet Center
325 First Street

Bowling Green
Date and Location:
April 1, 2004, 9-2pm,
Holiday Inn, University Plaza Hotel & Convention Center
1021 Wilkinson Trace

West Central and Central

Bardstown
Date and Location:
April 13, 2004, 1-5pm,
Bardstown Days Inn
1875 New Haven Rd

Louisville
Date and Location:
April 14, 2004, 9-2pm,
University of Louisville, Shelby Campus,
9001 Shelbyville Rd

Lexington
Date and Location:
April 20, 2004, 1-5pm,
University of Kentucky, Student Center
209 Student Center

Danville
Date and Location:
April 21, 2004, 1-5pm,
Danville Center For the Arts, Danville High School, 203 E Lexington Ave ■

"Being tough on these drug crimes isn't enough. We must move beyond that to being effective."

- Gov. Ernie Fletcher

NOT SOFT ON CRIME, BUT STRONG ON JUSTICE
The Kentucky Racial Justice Act: A Symbol; A Statement of Legal Principle; and A Commitment to Systemic Fundamental Fairness

Justice is often painted with bandaged eyes. She is described in forensic eloquence as utterly blind to wealth or poverty, high or low, black or white, but a mask of iron, however thick, could never blind American justice when a black man happens to be on trial. -Frederick Douglass

No person shall be subject to or given a sentence of death that was sought on the basis of race.

That has been the law of the Commonwealth of Kentucky since 1998. It is a clear and strong statement of justice. It is a powerful symbol of an ideal Kentucky is committed to achieve. It is a moral value that speaks volumes. Its promise is not yet the practice across the state. Its promise is, however, beginning to be realized.

Kentucky's 1998 Racial Justice Act (RJA) makes it clear that seeking or imposing death for racial reasons is prohibited. Its provisions are straightforward and commonsense:

1) Where a pattern of racial discrimination in seeking the death penalty is shown by evidence, including statistical evidence, the prosecutor has the responsibility to explain the reasons for the pattern;
2) If there is a legitimate reason for the pattern, then no relief is given;
3) If the prosecutor cannot prove a legitimate reason for the racial discrimination, a remedy is provided – death cannot be sought.

The Racial Justice Act as conceived nationally "is a civil rights measure and adopts evidentiary procedures similar to those employed against racial discrimination in other civil rights laws. It is based on the realization that prosecutors, judges, and jurors will rarely, if ever, admit that they were purposefully discriminatory in seeking or imposing the death penalty in a particular case. In the absence of such direct evidence of bias, the Act allows the use of statistical evidence to establish an inference of racial discrimination." Don Edwards and John Conyers, Jr., *The Racial Justice Act-A Simple Matter of Justice,* 20 Univ. of Dayton L. Rev. 699, 704 (1995).

What is the meaning of the 1998 Kentucky Racial Justice Act? What was the context of its passage? Why was it enacted into law? What is its purpose? Is it really needed? What has been its effect? How have criminal defense attorneys, prosecutors, and the judiciary responded to it? How does the public view racial discrimination in the criminal justice system? Is the criminal justice system strengthened or weakened by having a focused process to insure race is not a part of its outcomes?

Gerald Neal

Kentucky's Historical Context of Bigotry, Violence, and Racial Violence: Race has been and Remains a Factor

Context reveals meaning and provides a depth of understanding. The context for the enactment of the Racial Justice Act is substantial. Kentucky's history of violence, racial discrimination and racial violence is briefly reviewed to provide the rationale for this law.

Bigotry. Kentucky's history is rife with racial discrimination. Much of the racial discrimination was the public policy of the state as set out in its laws. No one who is familiar with the facts or who has reviewed our history could say otherwise.

In the *History of Blacks in Kentucky, Volume I,* (1990) at 323-324, Marion B. Lucas reviews the years of 1760-1891: "The Kentucky legislature that adjourned in early 1866 reflected the opinion of the state's white majority by indicating that it had no intention of elevating blacks to a status of equality…. After passing a number of measures which elevated freedmen to approximately the same position as that held by free blacks before the Civil War, the legislature fastened second-class citizenship on blacks by prohibiting them from giving court testimony against whites, sitting on juries, and voting. In other actions, the legislature laid the foundation for a segregated society. One law exempted physically impaired Civil War veterans from state and county taxation, and another prohibited the sale of homesteads for debt, but both laws applied only to whites. The legislature also mandated that tax rolls, taxes, and schools were to be divided by race, that treatment of apprentices might differ because of color, and that only whites could witness contracts. The antebellum law that provided harsher punishment for the rape of a white woman than for the same offense against black females remained intact. Another statute which declared interracial marriages a felony also required county officials to keep separate marriage records based on color….

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At war's end, Kentucky's legislature had solidified second-class citizenship for black residents by legally creating a two-color society. This refusal to protect the rights of blacks endorsed and continued a lamentable tradition of harassment and violence that had existed during slavery. The natural result was a segregated society in which color assured a subordinate status for blacks in both the city and the countryside."

As observed in the *History of Blacks in Kentucky*, 1891 saw Kentucky blacks freed from slavery but not from racism.

In the *History of Blacks in Kentucky, Volume II: In Pursuit of Equality, 1890-1980* (1992), George C. Wright reviews and documents Kentucky's racial bigotry in some stark detail. From 1890 to 1920 "racial discriminations existed on practically every front in Kentucky. It seems as if the vast majority of whites within the state and elsewhere agreed that blacks were 'different,' which meant 'inferior.'" *Id*. at 44.

Violence. "The commonwealth was a violent place." Harrison, Klotter, *A New History of Kentucky* (1997) at 434. "Elections took place in a state plagued by violence, and reports make it appear that almost every voting area featured fights and gunplay on the days votes were cast. The commonwealth seemed immersed in a culture of violence." *Id.* at 251.

Kentucky's "dark and bloody ground" of violence stretches from 1742 until 1968 through bloodshed over territory, labor, tobacco, immigration, feuds, and race. Carl Wedekind, *The Second Grave* (1999) at 13-60.

Racial Violence. George C. Wright, in *Racial Violence in Kentucky: Lynchings, Mob Rule, and "Legal Lynchings," 1865-1940,* vividly tells the story of how Kentucky violence, intertwined with Kentucky racism, led to stark realities. "The end of the Civil War ushered in a prolonged period of racial violence in Kentucky. This violence would be just as severe and long-lasting as that found in the Deep South, but too often it escaped the immediate attention of federal officials." *Id.* at 19. From 1860-1939, "…Kentucky had at least 353 people (258 blacks, 89 whites, and 6 unknowns) who were summarily executed." *Id.* at 70. Of the 7 regions in Kentucky, Western and Central Kentucky led with 81 and 83 black lynchings respectively. *Id.* at 73. Of these 353 executions, 85 blacks were lynched in Kentucky for rape or attempted rape.

As Wright documents, from 1875-1899 Kentucky turned to "legal lynchings" – an expedient trial with the appearance of due process, no black jurors, a prejudicial venue, and a preordained outcome of the harshest penalty. "The research of several scholars agrees that the decline of lynchings throughout the nation was due in part to the states taking on the role of the mob." *Id.* at 223.

"Legal lynching was only a part of the racial violence experienced by Afro-Americans in Kentucky. Clearly, however, legal lynching, because it made a complete mockery of the law and tended to destroy the respect citizens had for their legal process, proved to be far worse than the horrible acts of the mobs that ran blacks out of town or lynched them. These acts were illegal and no clear-thinking citizens suggested otherwise. On the other hand, the overwhelming majority of white Kentuckians believed that their legal system was fair, that even though blacks were denied equal access to most places in society, they were dealt with fairly in court. Therefore, they simply ignored the omission of blacks from juries and the obvious discrimination they faced in court, whether they were there as the defendant or the victimized party. With such an attitude so firmly embedded in white society, blacks clearly and consistently faced discrimination before the law." *Id.* at 304.

Kentucky's unpleasant history of racial violence is context for its present criminal justice system. Consider these simple comparisons. While Kentucky has a non-white population of 10%, its non-white incarcerated adult population is 33%,[1] its non-white death row population is 21%,[2] and its non-white incarcerated juvenile population is 40%. Some people in Kentucky are the victims of racial profiling, despite a statutory prohibition. Some are prosecuted for capital offenses due to racial discrimination, despite the Kentucky Racial Justice Act.

Since 1642, 363 children have been executed. 53% of them were black. 100% of the 40 children executed in the U.S. for rape or attempted rape were black. Two-thirds of those on death row in the United States who committed their crimes as juveniles are Black or Latino or Asian, including one individual on Kentucky's death row.

Of Kentucky's 164 executions by electrocution from 1911 until 2000, 85 or 52% were black.

Four of six, or 67%, of the children executed in Kentucky history have been black:

A Racial Bias Task Force commissioned by then Chief Justice Robert Stephens conducted a 1997 survey that "showed that an overwhelming majority of prisoners-both black and white-believe that courts treat people differently based on the color

NAME	RACE	COUNTY	CRIME	DATE EXECUTED	AGE
1. Silas Williams	B	Woodford	Murder	1913	16
2. Frank Carson	W	Nelson	Murder	1933	17
3. Burnett Sexton	W	Perry	Murder	1943	17
4. William Gray	B	Fayette	Murder	1943	17
5. Carl Fox	B	Campbell	Rape	1945	17
6. Arthur Jones	B	Mason	Murder	1946	16

of their skin." *The Kentucky Post*, Friday, September 12, 1997 at page 5-K.

A comprehensive study by informed scholars could tell us the meaning of all this data. But no one needs a study to understand that race is a factor in every aspect of life in the United States of America and in the world. Decisions based on race are made every day. Action or inaction is influenced by race, additions and deletions made because of race. There are no decisions in this society where the consideration of race is not taken into account either consciously or unconsciously.

No one wants to be branded a racist except those that live by that creed openly. The fact of the matter is that we make decisions to do and not to do things each day because of race, including:

- where we live,
- where we shop,
- who we associate with,
- what we accept,
- what we do not accept;
- who we see as credible;
- who we value;
- who we rely on;
- who we are scared of;
- who we incarcerate;
- who we decide to execute.

Race manifests itself in individual and ever more sophisticated systematic ways. We know how to identify and correct racial discrimination but do we have the will? We know that "…the tools are available to prevent racially motivated death sentences. What some may describe as the inevitability of such sentences or the impossibility of preventing, detecting, and correcting them reflects, in our judgment, only an unwillingness to make the effort." Baldus, Woodworth, Pulaski, *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction*, 51 Wash. & Lee L. Rev. 359, 419 (1994)

The National and Kentucky Contexts

The contexts nationally and in Kentucky provide further understanding of the reasons why the Kentucky Racial Justice Act was needed.

While Kentucky remains the only state with a Racial Justice Act, the concept was not conceived in Kentucky. It has come from substantial national understanding of the problem and the need for an effective remedy after the United States Supreme Court refused to redress the identified racial discrimination.

Racial discrimination in capital sentencing continues to be identified as a major flaw in death penalty cases nationally. "There is no question that both historical and the current imposition of the death penalty in this country are racially discriminatory. Nearly every study, including the federal government's General Accounting Office review of twenty-eight studies, has come to this conclusion. The 'distorting effects of racial discrimination' in the administration of the death penalty are, in truth, as old as the Republic." Blume, Eisenberg, Johnson, *Post-McClesky Racial Discrimination Claims in Capital Cases*, 83 Cornell Law Review 1771, 1774 (1998).

Yet, the United States Supreme Court refused to provide a legal remedy for racial discrimination in capital sentencing despite the overwhelming evidence presented to it. Instead, the Court effectively invited legislators to develop remedies for eliminating racial bias from the capital sentencing process. In a 5-4 decision, the United States Supreme Court held in 1987 that capital defendants do not have a *constitutional* right to use statistical proof of racial bias in court. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

"It is remarkable that in ten years of post-*McCleskey* litigation, not a single claimant has prevailed. In any discrimination case, judges are reluctant to find intentional discrimination by state officials. Nevertheless, in other classes of race cases, courts do find intentional discrimination with less evidence than has been accumulated in some of these cases." Blume, Eisenberg, Johnson, *Post-McClesky Racial Discrimination Claims in Capital Cases*, 83 Cornell Law Review 1771, 1807-1808 (1998).

After *McClesky*, national leaders provided the impetus for seeking the adoption of a Racial Justice Act. A national Racial Justice Act passed the House of Representatives in October as part of the Comprehensive Crime Control Act of 1990. It was dropped in conference. In 1991 it was again considered by the House as part of H.R. 3371. It was rejected 223-191. It passed the House in 1994 as part of the Violent Crime Control and law Enforcement Act. It was deleted from the final report of the conference committee under threat of filibuster by Senate Republicans. See Don Edwards and John Conyers, Jr., *The Racial Justice Act-A Simple Matter of Justice*, 20 Univ. of Dayton L. Rev. 699, 700-701 (1995).

In 1995, Erwin Chemerinsky argued for a Racial Justice Act, asking questions in his article, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 Santa Clara L. Rev. 519, 520 (1995), that go to the heart of the matter:

"What if 65% of the applicants for positions in a government office were African-American, but 80% of those hired were white? A black applicant certainly could bring a suit under Title VII of the 1964 Civil Rights Act and force the employer to show that race was not a factor in the hiring decisions.

"What if the prosecutor used peremptory challenges to strike prospective jurors who were black four times more than to exclude those who were white? Under *Batson v. Kentucky*, 476 U.S. 79 (1986), it is clear that the defense could require

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the prosecutor to demonstrate that the peremptory challenges were not exercised based on race.

"What if more than 60% of murder cases involved African-American victims, but in cases where the death penalty is sought more than 80% involved white victims? What if an African-American who kills a white victim is more than five times as likely to be given the death penalty than a white who kills a white? What if an African-American who kills a white is 60 times more likely to be sentenced to death than an African-American who kills an African-American? Does the law require that this racial disparity be explained on non-racial grounds? It should, but as of now, it clearly does not.

"In almost every important area - employment, housing, public benefits, peremptory challenges - proof of racially disparate impact can be used to require the government to prove a non-racial explanation for its actions. Not, however, with regard to the one area where the government determines who lives and who dies.

In 1997, the nation's leading professional legal organization called for an end to racial discrimination in the imposition of the death penalty. The ABA House of Delegates in a February 3, 1997 Resolution (No. 107) called for a moratorium on executions in this country until jurisdictions implement policies to insure that death penalty cases are administered fairly, impartially and in accordance with due process to minimize the risk that innocent persons may be executed. Far from being administered fairly and reliably, the death penalty in this country, according to the ABA, is "instead a haphazard maze of unfair practices with no internal consistency." Kentucky mirrors that national reality. The ABA resolution establishes a legal position on fairness in the application of the law; it is not a policy statement for or against the penalty. The ABA's call for a suspension of executions focuses on:
1) incompetency of counsel;
2) racial bias;
3) mentally retarded persons;
4) persons under 18 years of age; and,
5) preserving state and federal post-conviction review.

"The ABA's Moratorium Call," Kentucky's Public Advocate Ernie Lewis said, "acts as a moral statement condemning the Kentucky death penalty until change is made."

In 2001, The Constitution Project issued *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001) http://www.constitutionproject.org/dpi/MandatoryJustice.pdf. The Project's death penalty initiative and its bipartisan, blue ribbon committee issued this major national report. The Report was published after the group conducted a yearlong review of the death penalty in the United States.
The 30-member death penalty initiative was composed of both supporters and opponents of the death penalty. It included former judges, state attorneys general, federal prosecutors, law enforcement officials, governors, mayors, and journalists, as well as current defense attorneys, religious leaders, victims' rights advocates, Republicans and Democrats, conservatives and liberals. Co-Chairs of this 30-member group were: Charles F. Baird, former Judge, Texas Court of Criminal Appeals; Gerald Kogan, former Chief Justice, Supreme Court of the State of Florida, former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida; Beth A. Wilkinson**,** Prosecutor, Oklahoma City bombing case. William Sessions FBI Director in the Reagan and Bush administrations was a member.

Their report is a comprehensive consensus on capital punishment reached by an ideologically and politically diverse group with extensive death penalty and criminal justice experience. One of its co-chairs, Judge Baird, recently came to Kentucky and addressed the Kentucky Criminal Justice Council on the work of this national effort. The Report recommended 18 reforms to insure the fair administration of the death penalty including one on race. It sated, "Safeguarding Racial Fairness. Each jurisdiction should undertake a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system. Because these issues are so complex and difficult, two approaches are appropriate. One very important component - perhaps the most important - is the rigorous gathering of data on the operation of the capital punishment system and the role of race in it. A second component is to bring members of all races into every level of the decision-making process."

In July 2001, the Kentucky Criminal Justice Council Capital Committee unanimously recommended and the Council approved a recommendation that a comprehensive statewide study to address:

- Delay in implementing the penalty imposed and consideration of reforms in the review process to make it more timely (revision of RCr 11.42 and possible recommendation to Kentucky Supreme Court regarding stay practice);
- Incorporate balanced and systemic input, including prosecution and defense and victims' families, into any study;
- Effective assistance of counsel (minimum standards, certification) and training for trial judges;
- Access to DNA evidence;
- Evidentiary issues, *e.g.* jailhouse informant testimony identified as a problem in other jurisdictions; uncorroborated eye witness testimony; unrecorded confessions;
- Resources for prosecution and defense (establishment of special teams, representation/investigation experts);
- Prosecutor discretion in seeking death penalty; adaptation of federal guidelines or procedures in other states; independent review team to ensure statewide consistency in considering factors of race, geography, gender, economic status, age, cognitive abilities, and aggravating circumstances/level of culpability; and
- Jury selection and jury instruction in death penalty cases; educating potential jurors on trial process and overall

operation of criminal justice system; and criminal background checks of jurors in death penalty cases.

The 2002 Kentucky General Assembly refused to fund this study and the Council has not undertaken it otherwise. Other states such as Arizona, Connecticut, Illinois, Indiana, Nebraska, North Carolina are seriously studying the application of the death penalty.

A recent 600 page study of the death penalty nationally by Liebman, Fagan, Gelman, Davies, West and Kiss, *A Broken System, Part II, Why There is so Much Error in Capital Cases, and What Can be Done About It?* (February 2002) provides additional evidence that race may be playing an important and inappropriate role in Kentucky death sentences and may be increasing the amount of reversible error in Kentucky death verdicts. The study examined over 150 potential explanations for error in capital cases based on thousands of items of data about capital reversals over time, across the country, and in each state with capital punishment.

Kentucky's rate of reversal of capital verdicts from 1976 - 1995 exceeds the national error rate of 68%. The study provides some troubling information about two possible causes of capital error in Kentucky. The first factor is the low rate of funding for Kentucky courts. The study shows that low spending on courts is associated with direct appeal reversal rates in capital cases. During the 23 year period studied, Kentucky spent less per capita on courts than all but four states in the nation with the death penalty.

The second factor is the homicide risk to members of the white community relative to the risk of homicide to members of the African-American community. The study found that the closer the homicide risk to white residents of a state approaches the risk of homicide to the state's African-American residents, the more likely it is that state and federal courts will find that death sentences imposed are flawed and have to be overturned. Other things being equal, reversal rates are more than twice as high where homicides are most heavily concentrated on whites compared to blacks than where they are the most heavily concentrated on blacks. Kentucky has the 5th worst ranking on this factor in the nation among states that have the death penalty.

The authors view this second factor as significant and troubling because it may reveal the influence of race on the use of the death penalty. There is evidence that heavy use of the death penalty in response to fears about crime is associated with high rates of error in capital verdicts. The authors also found evidence that high rates of homicide victimization among whites relative to blacks are the one source of pressure from a politically influential segment of the population to use the death penalty for reasons other than the seriousness of particular crimes. Since homicide rates are high in Kentucky for whites relative to homicide rates for blacks, this factor is likely to increase the kind of crime fears among whites that can lead to the imposition of death sentences in weak or marginal cases, which in turn can lead to high rates of reversible error. "Because of those fears, citizens put pressure on officials to seek the death penalty more frequently, even if cases are weak. The weaker the case, the more likely it is to be overturned." *Charlotte Observer* article, February 11, 2002.

Comprehensive studies by Kentucky scholars demonstrate that discrimination exists in Kentucky capital sentencing on the basis of the race of either the victim or defendant. The facts show that the race of the defendant and the race of the victim do play an inappropriate role in some Kentucky capital cases.

In 1992 the Kentucky General Assembly passed Senate Bill 8 - *Bias Related Crime Reporting* requiring that the Kentucky Justice Cabinet and the Department of Public Advocacy perform a study to determine if racial bias played any role in death sentencing.

These two agencies commissioned Thomas J. Keil of the University of Louisville Sociology Department and Gennaro F. Vito of the University of Louisville School of Justice Administration to study Kentucky homicides from 1976-1991. They found in their 1993 study Keil & Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing* (Sept. 1993) published as *Race and the Death Penalty in Kentucky Murder Trails: 1976 – 1991*, American Journal of Criminal Justice, Vol. 20, No. 1 (1995) that racial discrimination does exist in Kentucky's capital process. As stated in their abstract:

- Blacks accused of killing whites had a higher than average probability of being charged with a crime by the prosecutor and sentenced to die by the jury than other homicide offenders;
- The finding remains after taking into account the effects of differences in the heinousness of the murder, prior criminal record, personal relationship between the victim and offender, and the probability of the accused will not stand trial for a capital offense;
- Kentucky's guided discretion system of capital sentencing has failed to eliminate race as a factor in the process.

These same scholars previously had found in Kentucky that "prosecutors were more likely to seek the death penalty in cases in which blacks killed whites and that juries were more likely to sentence to death blacks who killed whites." Keil and Vito, *Race, Homicide Severity, and Application of the Death Penalty: A Consideration of the Barnett Scale*, Criminology Vol. 27, No. 3 (1989). "In Kentucky, race is inextricably bound up with the way in which the capital sentencing process operates." *Id*. at 528.

There was a struggle in achieving enactment of the Racial Justice Act that spanned many legislative sessions. At 10:00 p.m. Wednesday night March 27, 1996, after hours of wrangling over health care reform, SB 132 addressing racial bias in Kentucky's death penalty was finally called up on the floor of

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the House of Representatives. Bill opponents, especially Representatives Jon Ackerson and Dave Stengel from Jefferson County, filed 13 floor amendments which would have weakened the bill.

Speaking in favor of the Racial Justice Act in an hour-long floor debate were House Judiciary Chair Mike Bowling from Middlesboro, Lexington Representative Jesse Crenshaw, Louisville Representative Eleanor Jordan, and Whitesburg Representative Paul Mason, among others.

As legislators returned from a hastily arranged meal, Jordan reminded them that SB 132 was not just another bill regulating this or that occupation — they were being asked to deal with fundamental issues of life and death, and with state sanctioned racial bias.

In the end, all but two amendments were defeated, and SB 132 passed by a wide margin of 72 to 19. Just one week earlier, SB 132 appeared dead when it came up one vote shy of the ten votes necessary to pass out of the House Judiciary Committee. Representatives Stengel and Ackerson were two of the bill's principal opponents in committee, as well.

But Representatives Jesse Crenshaw and Mike Bowling and myself refused to let the bill die. On Monday, March 25, Bowling called an emergency committee meeting on the House floor, where SB 132 gained three more votes after deletion of provisions making the bill applicable to those currently on Death Row.

SB 132 went back to the Senate floor where Senators voted 18-16 against it with the House amendments. I vowed to file the bill again "because it is right." *Lexington Herald Leader*, Tuesday April 2, 1996 page B-4.

In the next General Assembly Senate Bill Committee Substitute 171 sponsored by me passed the Senate 22-12 on Thursday, February 5, 1998 after two hours of vigorous debate. The identical House Bill 543 sponsored by Representative Jesse Crenshaw of Lexington was introduced February 9, 1998 in the House. After a vigorous hour-long debate in the House, SB 171 passed.

During the Senate floor debate, I said SB 171 was simply a method of insuring racism did not play a role in death sentences. I observed that under the Act, defendants bore a high threshold to prove race was a factor. Senator Charlie Borders of Russell said, "This is a vote on whether we're soft on crime." I championed the bill's intent by stating, *"I'm not soft on crime. I'm strong on justice."* Some senators were using "scare tactics" to attack the bill. They did not want the status quo disturbed.

In the extended House debate on SB 171, Representative Jesse Crenshaw led the fight for passage. He introduced retired circuit Judge Benjamin Shobe in the House Gallery and read from his 1996 letter (reaffirmed February 1998) to Representative Mike Bowling, chair of the House Judiciary Committee:

I address you as an African-American former Circuit Judge, whose legal experience in Kentucky exceeds fifty years. During this time, I presided in cases in which the death penalty was sought and obtained both pre-*Furman* and after *Gregg*.

My concern is SB 132/SCS [now SB 171] which proposes to at least increase the perception of fairness in the death penalty procedures of Kentucky. Because the death penalty is our society's ultimate punishment, citizens realize it application must be supremely fair and, therefore, expect that racial bias play no role in its use. SB 132/SCS [now SB 171] proposes only to insure that the death penalty not be sought on the basis of race. This seems to me to be the least we can do to help erase the perception of minorities that they do not get a fair deal before the courts.

I have received the proposed legislation, with an eye toward considering the objections which have been raised by prosecutors. One of their objections is that this bill will erase the death penalty in Kentucky. This is entirely untrue. If restrictions upon the issuance of capital punishment are to be looked upon as matters of abolition, then we would no longer need present requirements such as consideration of mitigating circumstances, juries that meet the *Batson* standard, and proportionality reviews by the Kentucky Supreme Court. Are we to believe and can we tell our constituents that death penalty procedures in this State are so infected by race bias that no capital case could ever be tried in which the death penalty is sought? Of course not.

The objection that such procedures required by the bill are onerous and costly has very little merit. After all, judicial decisions are made frequently based upon statistical information, and properly so. It has been my experience that those charged with the responsibility of presenting such information have the greater responsibility. Therefore, the burden to present evidence of racial bias is upon the accused. May we say to them that any information which would tend to show that they were accused and convicted because of race should not be a part of the proceeding? Of course not. With the experience this nation underwent as a result of the *Miranda* decision, policemen have become more professional. Should prosecutors object to having their actions scrutinized to determine whether they are free from untoward motivations? Of course not. As a former prosecutor, I recognize the obligation of this office to be eminently fair. This legislation requires no more.

I am grateful for your support of the pending measure and assure you that the citizens of Kentucky will be relieved when passage of this bill guarantees greater racial justice and harmony in our Commonwealth.

SB 171 passed the House 70-23 on March 30, 1998 after three amendments were defeated.

The vote is a strong expression by the legislators that they support concepts of racial justice.

The 1998 Kentucky Racial Justice Act reads as follows:

532.300 Prohibition against death sentence being sought or given on the basis of race — Procedures for dealing with claims.
(1) No person shall be subject to or given a sentence of death that was sought on the basis of race.
(2) A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought.
(3) Evidence relevant to establish a finding that race was the basis of the decision to seek a death sentence may include statistical evidence or other evidence, or both, that death sentences were sought significantly more frequently:
(a) Upon persons of one race than upon persons of another race; or
(b) As punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.
(4) The defendant shall state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case. The claim shall be raised by the defendant at the pre-trial conference. The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties. If the court finds that race was the basis of the decision to seek the death sentence, the court shall order that a death sentence shall not be sought.
(5) The defendant has the burden of proving by clear and convincing evidence that race was the basis of the decision to seek the death penalty. The Commonwealth may offer evidence in rebuttal of the claims or evidence of the defendant.
Effective: July 15, 1998; History: Created 1998 Ky. Acts ch. 252, sec. 1, effective July 15, 1998.

532.305 Application of KRS 532.300.
KRS 532.300 shall not apply to sentences imposed prior to July 15, 1998.
Effective: July 15, 1998; History: Created 1998 Ky. Acts ch. 252, sec. 2, effective July 15, 1998.
532.309 Short title for KRS 532.300 to 532.309.
KRS 532.300 to 532.309 shall be cited as the Kentucky Racial Justice Act.
Effective: July 15, 1998; History: Created 1998 Ky. Acts ch. 252, sec. 3, effective July 15, 1998.

The Response of Defenders, Prosecutors, Judges, the Public to the 1998 RJA and to Racial Discrimination

Laws do not effectuate themselves. People effectuate laws. We know this, for instance, from the history of the Civil Rights Act. The reality is that the RJA means nothing unless those who were in the position to utilize it use it. Some people might not utilize the Act because they say, "I don't see how I can litigate it. I don't have the resources to effectively investigate it, obtain a study of it, raise it as an issue." But, I wonder how many just really do not believe that race is a significant or a determining factor in what happens in some aspects of our criminal justice system. The above context should give them pause. The above statistics and Kentucky studies should cause them to reconsider.

The Kentucky Racial Justice Act is a change of significance. It is a change many have not accepted. Yet it is beginning to be realized. The response of some indicates the refusal to accept and implement the law. The response of others is a lack of awareness. And then there are some that are working to make it reality.

Defenders

In September 2002, all Kentucky public defenders across the state were surveyed on how the Kentucky Racial Justice Act has been implemented. Sixty-four defenders responded with a variety of interesting thoughts. Of the 64, 4 said they had a case that involved the Racial Justice Act provisions. Eight said they were aware of anyone else raising the protections of the Act.

Defenders have used the Act with some encouraging initial results. They reported as follows:

- In a Jefferson Circuit Court case, there was no plea offer made by the Assistant Commonwealth Attorney. Defense counsel were told this was because of some "policy." Other death cases were having offers extended. Defense counsel were prepared to argue that their client didn't have an offer because his victim was white. There was a motion to discover the policy of the Commonwealth Attorney's Office concerning plea bargaining in death penalty cases. Assistant Commonwealth Attorneys and the Commonwealth Attorney were subpoenaed. It was the belief of the litigators that they would have impeached one another in answering the question of whether plea bargaining was prohibited in death cases. It was the defenders' belief that there was no such policy. The Court quashed all subpoenas and refused the motion to question these witnesses by avowal. The Court also denied the motion to require the Commonwealth to reveal whatever policy existed. The case was resolved when the Commonwealth later made a regular life offer with parole eligibility in 12 years.
- An RJA motion was made in a case in Jefferson Circuit Court. It was the belief of defense counsel that the Commonwealth had a policy of not seeking death against defendants who had been found incompetent to stand trial and then had competency restored. All other defendants who fit in this category had killed nonwhite victims. The motion to discover the policy was denied, as was a re-

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quest for an evidentiary hearing. The defendant received LWOP 25 from a jury and did not appeal. There was no offer made by the Commonwealth prior to trial.

- An RJA discovery motion was filed by defenders in Warren Circuit Court concerning the history of the prosecutor seeking death. Before the Court ruled on the motion, the Commonwealth Attorney voluntarily provided the information requested. The case was resolved with a regular life plea with parole eligibility in 12 years.
- In a case involving a minority defendant and multiple victims of the same racial minority, defense counsel, citing the RJA, moved for discovery of the prosecutor's charging history in potential death penalty cases. This resulted in the prosecutor having to provide detailed information about all the potential death cases he had faced during his tenure, and why he decided to seek death, or not to seek death, in each case. A plea offer was subsequently made and, ultimately, the negotiation led to a really favorable plea agreement. As it turned out, the prosecutor's charging history did not show any basis on which to argue that his decision to seek death in this case was race-based. So no further challenge based upon race was made in that case. However, the RJA was one factor leading to a favorable settlement.
- A Herculean effort to argue in good faith that the Act should apply retroactively in a capital post conviction case, *Matthews v. Parker*, No. 3:99-CV-91, was made by defense counsel, even though the Act itself expressly says it isn't retroactive. Unfortunately, this only seemed to alienate the judges.
- In another case, a hearing was held, statistics considered, motion to exclude death as a possible punishment was overruled.
- The Bennie Gamble murder case in Paducah involved one black male defendant facing death and two white female codefendants who were not facing death. The victim was a white male. The prosecutor after motions and argument withdrew death as a possible punishment for Mr. Gamble. He was convicted of murder and first-degree robbery and sentenced to life in prison. The Kentucky Supreme Court reversed this case by a 4-3 vote because of the failure of the trial judge to excuse for cause a juror who had racist views. *Gamble v. Commonwealth,* Ky., 68 S.W.3d 367, 373 (2002) (" While Juror # 54 was hesitant to label himself a bigot, and clearly embarrassed when voicing his views on race, he did state that: (1) he was racially biased; (2) he left his neighborhood because young black men were hanging around in the area; (3) when he walked into the courtroom he assumed that Appellant was the accused because of the color of his skin; (4) and he was opposed to, in fact, offended by, inter-racial relationships. Juror # 54 specifically stated that he felt that people who were involved in such relationships were low class, and that low class people were more likely to commit crimes. Juror # 54 stated that it was "hard to say" how the presence of an inter-racial relationship would affect his decision in this case. While Juror # 54 did eventually state that he could be fair and reach a decision on the evidence, every indication was that he holds racist ideas which affected his view of Appellant before the first piece of evidence was presented to him. In short, he had indicated a bias so strong that he could not be rehabilitated. As stated in *Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 718 (1991)*, further questions do 'not provide a device to 'rehabilitate' a juror who should be considered disqualified by his personal knowledge or his past experience, or his attitude as expressed on voir dire.' 'This juror had indicated a bias so strong that the prosecutor's questions did not serve to remove the disqualification.'").

When asked what effect the Act has had on the race discrimination in Kentucky, public defenders responding to the September RJA 2002 Survey observed:

- It announces the statewide standard that all must follow as a matter of law whether they agree with it or not. It calls prosecutors to reform their charging and prosecution process. It calls on judges to insure that no prosecutions are done as a product of race discrimination. It calls defense attorneys to use this state-created standard to litigate so that no one is prosecuted illegally.
- Mostly symbolic. Brings the issue out in the open. Gives credence to the racial arguments we make. I have had racial issues arise before the act where it would have been nice to have the act as a back up.
- I think thus far it has had mostly symbolic and national importance. I also believe it has had an unknown effect on prosecutors, hopefully a good one.
- Possibly caused the prosecution to not seek the death penalty against an African-American defendant.
- Recognizes that bias is at least possible and is not the result of defense counsel's ingenuity. Since the passage of the Act, it is my perception that the effect has been positive.

But there is another set of responses from defenders responding to the September RJA 2002 Survey that are troublesome:

- A negative one — the essential effect is that prosecutors have adopted policies of pursuing death in every eligible case, rather than making a case by case determination. The result is an increase in the number of death sentences sought and received, to say nothing for the increased drain on agency resources.
- I don't think words change anything—prosecutors will still find excuses to treat African American defendants differently.
- I have always seen the Commonwealth notice death on every eligible person in my jurisdictions. I think that the AGs office for example is very careful to avoid the "Racist" label and charges everybody with the maximum. I believe that the prosecutor is more inclined to offer the sweeter plea bargain to folks with a similar background to him/her and that usually means the white guy.
- I have faced, openly and sub voce, a "reverse RJA" wherein the prosecutor notices in each and every case where there

is arguably an aggravator. It was openly used that way by Tim Kaltenbach in Paducah, and it made the lead story in the Paducah Sun. I believe that this is also the unspoken methodology in at least one other jurisdiction. I have been successful in "making them pay" by overloading them with activity and actions which required labor on their part that could: go away: by their taking death off the table (*i.e.*, more successful in taking death off the table where they weren't totally committed to a death sentence from the start).

- I do not know first hand. I have heard of some prosecutors seeking death in all cases in which an aggravating circumstance is present. In reality, I do not feel it can really protect against discrimination in the death penalty. Prosecutors know how to disguise their motives. I am uncertain if it has had any. It would interesting to know how many Commonwealth's Attorneys are not only aware of the act but also its terms.
- I believe it has caused the prosecutors to seek death in more cases and be more reluctant to negotiate a plea, so that they will be seen as non-discriminatory.
- I believe it sometimes leads to notice being given in (non-racially sensitive) cases where it might otherwise not be sought so that prosecutors can reference the case to defend against a Racial Justice motion. However, I know of no case where I felt this led to an inappropriate death penalty trial. I also know of no case where this admirable public policy led to taking the death penalty off the table.
- My recollection is that Tim Kaltenbach referred to this when he decided to seek death penalty on three Afro-Americans who were accused of killing and robbing another Afro-American: his point, not to seek death would devalue the worth of the life of the victim because of his race.

Meaning and Symbol are Critical

People of good will seek meaning in their actions, in the understanding of the actions of others and their government and in their life. They want their leaders and their government and their elected representatives to work to advance the good of the public. They want to believe that the future will be better because of what they do and what their leaders do. They want to be treated fairly and they want to know that others are treated fairly, especially in the criminal justice system. This is as American as apple pie. Meaning is manifested in a state's laws, practices.

These laws and practices are important symbols of what means the most to us. "Symbols embody and express [a society's] culture – the interwoven pattern of beliefs, values, practices, and artifacts that define for members who they are and how they are to do things." Bolman and Deal, *Reframing Organizations: Artistry, Choice, and Leadership* (2d ed. 1997) at 217. The Kentucky Racial Justice Act provides an important symbol of what means the most to us in the Commonwealth.

Defenders expressed these responses to the September RJA 2002 Survey question, What is the symbolic meaning of Kentucky's Racial Justice Act:

- A decision of whether or not to seek a sentence of death should not be made on the basis of a person's race.
- Again, I cannot answer this question due to fact that I have never used it.
- All human beings in Kentucky should be treated equally - the criminal justice system cannot consider race when deciding on bringing capital charges.
- Equality/balance
- Fairness.
- I believe the Act forces prosecutors to examine their reasons for seeking death, and causes them to pause before doing so.
- It is a good law to have on the books. It expresses a proper position.
- It is that all of us are equal. We will not allow prosecutors or judges to sentence people to death because of their race or the race of the victim. It is a major public policy statement to the criminal justice system and to the people of KY.
- It is the first stumbling, roadblock the state has to encounter before it can put a defendant to death. It looms like the Sword of Damocles, which may fall on the next person who tries to prosecute an African American in a death penalty case.
- It makes a statement that extreme penalties are meted out disproportionately based on race, that Kentucky acknowledges this fact, and is attempting to rectify that injustice.
- It means that our state is committed to treating criminal defendants fairly without race being involved, whether it be the race of the defendant or the victim.
- Recognizes that there is a history of disparate treatment in Kentucky that must be considered even though most of the stereotypical overt forms of discrimination have been eliminated
- Something like a Star of Bethlehem for a future Kentucky and USA where tolerance and understanding are the norm, not the exception.
- Symbolically, it means the death penalty should be color blind in our state
- Symbolically, we can say, "all men are created equal" under Kentucky's law.
- The Act symbolizes the fact that the fight for racial justice is still alive.
- The RJA is recognition that we in Kentucky HAVE engaged in racial discrimination when it comes to the death penalty and that we pledge not to do it anymore. The exclusion of our previously-sentenced death row inmates from the ranks of those who may benefit from the statute, however, symbolizes (a) our lack of TRUE repentance for our past sins and (b) the cowardly interest of most legislators in mere window-dressing, rather than real reform.
- The meaning (I think it is more than symbolic) is that racial discrimination in criminal prosecution now has a formal

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statutory recognition. It can now be listed among the "interests" that the Commonwealth has officially adopted in their prosecutions. This makes it more difficult to dismiss out of hand and may have lasting effects on prosecutions once it is interpreted by appellate courts.

- That our racist past, particularly in regards to capital punishment, is unacceptable, and that we are going to take the lead on writing that moral wrong.
- The people of Kentucky, in adopting the Racial Justice Act through their elected representatives, have announced their complete rejection of the death penalty as a tool of discrimination. The people of Kentucky have renounced the illegitimate use of the ultimate punishment for the furtherance of that great evil, racism.
- The symbolic value of the act is huge. It is the watchdog that we can point to, not as a theory, but as a fact.

But other responses were more than disconcerting:

- Just that—symbolic. Again, it does not address systemic racial injustice or try to change attitudes.
- It gives the impression we have a fair and even handed judicial system.
- In my opinion, the symbolism that KY will not look the other way when the DP is to be applied in a racially discriminatory manner is 97% of the value of the bill. I have seen little practical effect in my practice.
- The Racial Justice Act is wholly symbolic, as it has yet to be seen to benefit clients on a daily basis.
- (I'm not sure you want the answer to this question, but since you asked, I'll give it) The RJA symbolizes to me what happens when good intentions are not coupled with good policy. Many people, myself included, predicted that prosecutors would interpret the RJA as punishing their discretion, and that their response would be to adopt a policy of filing death notices in every eligible case. In those counties with enough death eligible cases that we might otherwise be able to make a claim, that appears to have been what has happened. Far from improving "racial justice", we have merely increased the drain on our resources and fueled the death machine. No African American soul has been saved by this legislation, the title of the act notwithstanding.

When these Kentucky defenders were asked in the September RJA 2002 Survey why they thought that the Racial Justice Act has not been used more, they expressed some significant thoughts:

- 1) Very tough to compile necessary info and prove. 2) Every case is different and the facts of any death penalty-eligible case can be presented to make it worse than other comparable cases. 3) Arguing in a public high-profile case that the local prosecutor is applying the law in a racist manner does not foster positive relationships in that particular case or in the thousands of cases between the defender's office and Commonwealth. In my opinion, in a clear majority of counties, formally raising a Racial Justice Act motion would have dire consequences on the success of the defense attorney in that individual case and perhaps scores of other cases while the prosecutor cools down from being called racist in the local paper.
- At least here, we are not working in a vacuum. These are people with whom we work and who we know. If there is an aggravating factor, and they give notice, that generally means that we have not been successful at working out a plea. In the only death case from this area in a decade, the client was offered a plea and declined it. That makes it hard to argue racism when it seems much more likely that the death penalty was used to get pleas.
- Attorneys are unfamiliar with it.
- Because it is a new act, because it involves a significant study using statistics, and because our line staff do not want to accuse their prosecutors of being racist even when prosecutor their clients in a capital case.
- Because it is a toothless tiger, an empty symbolic gesture without any realistic enforcement mechanism. Statistics are only a useful source of evidence if there are large sample groups from which to draw. In most counties, there are only a handful of eligible cases, far too few to draw any conclusions — particularly given the lack of racial diversity in those counties. In counties where there are more cases (and more African-Americans) the prosecutors have responded exactly as predicted, by sending everybody they can to the death chamber, rather than merely the black perpetrators and the killers of whites.
- Because racial discrimination is difficult to show. And advocating the act may result in more prosecutions and an unwillingness to negotiate. Also, since race has a bearing on EVERY case (even white defendant and/or white victim cases) I believe there is some reluctance on the part of defense attorneys to raise the RJA so often, for fear of scuttling the act.
- Because the court has been reluctant to admit racism plays a role in criminal prosecutions.
- Because the death penalty is requested every time there is an applicable aggravator. It actually leaves less room for negotiation.
- Because the prosecutors are aware now that their actions will be monitored more closely. Thus, they do not even want the possible perception that the death penalty is being sought based upon the race of the defendant.
- Defense attorneys, especially public defenders, have too many cases and too few resources to litigate this properly, and too many defense attorneys and public defenders do not really believe that there is a race problem or are afraid to litigate this claim as it gets reduced to the prosecutor is a racist and is explosive and they fear the prosecutor will retaliate against them in this or other cases.
- I can answer only for myself, but I doubt that my experience is very unique: a) I have to pick and choose which battles to fight, because there aren't enough hours in the day to fight them all. Almost without exception, my cases involve white defendants, charged with killing white victims, in jurisdictions which are 95+% white, where no mem-

ber of a minority race has been charged with murder, or has been a murder victim, within anyone's memory. In such cases, if I have to choose between mounting an RJA challenge and doing some other work on the case, I'll opt against the RJA challenge. I do wonder why more RJA challenges haven't come out of the jurisdictions which have more racial diversity than my area. b) The statutory language is confusing. In one place, it says that we can make our case by showing that race was a significant factor STATEWIDE in decisions to seek death. In another place, it says that we have to state specifically how race played a part in the decision-making in our own case and then we must prove that race was "THE basis" for the decision to seek death. The requirement of showing race-based decision-making in one particular case is a MAJOR burden. I had thought that the RJA would relieve us of that burden, rather than codify it.

- It is a hard thing to accuse an attorney you know and respect of any form of racism. It is also hard to make a case under the act because the judges deciding under it also know and in most cases respect the prosecutor.
- It's always difficult to get people to raise race issues.
- KRS 532.300 requires the defendant to meet a very heavy evidentiary burden, which then may (if the Court is thus satisfied) be defeated by the prosecutor's assertion of any barely credible non discriminatory reason for the charging decision. This does not explain why the RJA is not used more, but it does explain why the RJA has not brought down the death penalty. It sounds like the prosecutors referenced in the question had very guilty consciences indeed.
- Many people are not aware of it.
- My first thought is that the Racial Justice Act has not been used more often than it has because of lack of knowledge among legal practitioners about its existence and regarding its practical use.
- Not enough time has passed. Be more patient. It is too soon for this survey.
- Prosecutors are always predicting the end of the world, I wouldn't give them much credence. People still don't like to raise racial issues. It's awkward to call a judge racist. When I have done that, everyone else in the room (including other DPA defense attys) physically moved away from me and kept their mouths shut. Often, the issues are ambiguous rather than slap you in the face racism.
- Prosecutors are now on notice to be fair.
- Prosecutors have postured their approach in cases to project a racially-neutral image.
- The ability of prosecutors to hide their motive and/or bias.
- The perception, at least, that the recommended methodology requires virtually gargantuan efforts, time and cost, for the surveys, etc. Some public defenders demonstrated otherwise, but the perception (*i.e.*, the reality therefor) is still out there. Also, the prosecutors are aware and we have a situation where the RJA is having a significant positive effect without defense intervention by way on not giving notice where the aggravator did exist.
- The threat of being exposed as racist has caused prosecutors to be more careful when deciding to seek the death penalty, thereby negating the need to raise the defense provided by the Act. As mentioned previously, raising the specter of the Act during negotiations at pre trial results in not needing to raise the act formally.
- They found an end-run around RJA.

Defense attorneys carry the mantle of challenging the government, an important part of what has to be done in the system to maintain a democracy. Defenders, as people whose decisions impact the lives of individuals, as well the effectiveness of the Racial Justice Act, should take very serious note of and find avenues in which to utilize the Act as a tool to combat racial discrimination. This is especially important when death is the ultimate punishment.

Defenders, I encourage you to pursue implementing the RJA with vigor, as some of your courageous colleagues have done.

Prosecutors

During its consideration in the Kentucky General Assembly, Commonwealth Attorneys went out of their way to oppose the RJA and dilute it. Why? What do they fear? They fought the RJA in an irrational way. Some of them took positions that were less than commendable. They were not honest in their approach in dealing with these things and were trying, in some instances, to undermine it at all costs.

If race is not a part of this capital process, prosecutors have nothing to fear. Our judges will make that finding. Prosecutors should want this clear, rationale procedure to insure the process has integrity and the full confidence of the people of Kentucky when one of its citizens' life is taken by the state.

Where a pattern of race discrimination is shown, a government official should have the responsibility to explain the reasons for the pattern. Sometimes there are reasons for prosecuting a case capital that are legitimate despite the pattern. If, however, a government official is unable to explain legitimate reasons for a pattern of racial discrimination, there should be a remedy available to the person.

The Kentucky Racial Justice Act provides an opportunity for a defendant to place relevant evidence before a judge. The Act restores integrity to a justice system that is still tainted by the discrimination that caused the Supreme Court to strike down all death penalty statutes in 1972. The Court made it clear that discrimination could not be tolerated, and in *McCleskey v. Kemp*, 481 U.S. 279 (1987) has provided a direction for states to take to eliminate it in capital sentencing.

Prosecutors argued that the Racial Justice Act would eliminate the death penalty in Kentucky. The Act has not abolished the death penalty in Kentucky. It prohibits only the imposition of a death sentence when the Court has found that racial bias existed in a particular capital case.

The Commonwealth can seek the death penalty by showing that any apparent racial disparity was really based on nonracial fac-

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tors, such as the brutality of the offenses or the prior records of the offenders. The State can seek a death penalty in any case that does not fit within a racially discriminatory pattern. This will be particularly true in highly aggravated cases where there is no evidence of racial bias.

The RJA merely says that when a prosecutor is making a decision as to how to proceed with a case that s/he makes sure that other cases, black or white, defendant or victim, that have a similar level of seriousness, are charged in the same way. In this way, there would no longer be an over-representations of blacks being charged with capital crimes or under-representations of whites.

Only those who use their discretion in a way that leads to racial imbalances will be unable to seek the death sentence.

Prosecutors who believe that the RJA would abolish the death penalty must also believe that a decision to seek the death penalty can always be proven to be based on racial discrimination. Otherwise, one would not assert that the Act will end the death penalty in Kentucky. This is very disturbing. It reflects either (a) a belief that unexplainable racial disparities are not genuine indicators of the intrusion of race bias in the capital sentencing process, or (b) a willingness to tolerate race discrimination for the sake of capital punishment. Neither of these rationales is acceptable.

Prosecutors also argued that statistics should not be allowed to be used as that was the reverse of the criminal justice system's value of considering only the individual before it for particularized sentencing. Racial discrimination is the opposite of treating each individual as unique, with punishment and treatment particularized to who he/she is or what he/she has done. Rather, racism treats persons with the same color of skin the same, regardless of who they are or what they have done. There is evidence that prosecutors/judges/juries have historically discriminated against black defendants who have killed white victims. The Racial Justice Act seeks to eliminate race from the calculus, freeing all of the parties to treat each defendant in a particular way without the broad taint of generalized racism.

Prosecutors also argued that there is no need for this Act because defendants can currently raise the issue of racism. The United States Supreme Court has invited legislators to develop remedies for eliminating racial bias from the capital sentencing process. In a 5-4 decision, the United States Supreme Court held in *1987* that capital defendants do not have a *constitutional* right to use statistical proof of racial bias in court. *McCleskey v. Kemp*, 481 U.S. 279 (1987). In that case, the Court did invite taking this issue to the state legislatures to provide a remedy. Without this Act, a defendant who is subject of discrimination has no certain remedy.

The principle of equal treatment in the criminal courts goes to the core of our civil rights history and to the integrity of our entire system of justice. The question is not whether you are for or against the death penalty. The question is whether the death penalty should be subject to the same standard of nondiscrimination as any other institution in our state.

The RJA prohibits racial bias in the seeking of a death sentence. It permits individuals who believe the decision to seek a death sentence is the result of race discrimination to base their claim on the same type of evidence that is used by other civil rights litigants to challenge discrimination in employment, housing, or education.

Prosecutors argued that they would not be able to rebut the study since the state's burden is impossible to meet. The facts are otherwise. The state can rebut the allegations of discrimination in several ways. For example, rebuttal could be race neutral facts like the aggravating and mitigating circumstances in the cases being compared. The state can explain the apparent pattern of disparities in the defendant's case does not fit any pattern that does exist. One could argue that in all multiple death aggravator cases, the death penalty was always sought and that this explains why the decision to ask for. death was made. Prosecutors could also use expert witnesses to show how the evidence presented by the defendant is invalid. The state met its burden of proof at the trial level in *McCleskey v. Kemp*, 481 U.S. 279 (1987) where the district court held an evidentiary hearing under procedures similar to those the Act would require and the state convinced the court that the statistical evidence was invalid. The Supreme Court, passing over this factual finding, ruled as a matter of law, that statistics could never be used in a death case, regardless of validity, unless legislatures enacted laws allowing statistical evidence to be used. The Racial Justice Act responds to the Supreme Court's legal ruling.

Many prosecutors have said that the solution to complying with the Act is to seek death in every case that can be prosecuted as a capital case. Many have followed that promise but others have not. In effect, the prosecutors who prosecute every case possible as capital to avoid being accused of seeking in their discretion death for a racial reason have decided to exercise no discretion. The people of Kentucky have not elected Commonwealth Attorneys to exercise no discretion. Such behavior turns the Act on its head in derogation of the law of the Commonwealth, which prosecutors are sworn to uphold.

Prosecutors, I encourage you to implement the RJA with vigor. Use your discretion wisely.

Judges

In assessing the response of the judiciary, it is helpful to look at the context over a course of time. Kentucky courts have not been especially friendly to claims of racial discrimination in criminal cases.

Prior to enactment of the Racial Justice Act, the Kentucky Supreme Court did not find relevant a statewide study of capital cases over 15 years indicating there is racial discrimination in the imposition of the death sentence in Kentucky. *Bussell v. Commonwealth*, Ky., 882 S.W.2d 111, 115 (1994). In *Gamble v. Commonwealth*, Ky., 68 S.W.3d 367, 373 (2002) the Kentucky Supreme Court did reverse the conviction by a 4-3 vote be-

cause of the failure of the trial judge to excuse for cause a juror who had racist views.

Members of all races in Kentucky are not sufficiently brought into every level of the decision making process. Kentucky is required to follow *Batson v. Kentucky*, 476 U.S. 79 (1986) but in the 25 years since *Batson* was decided, there is but one reversal by a Kentucky appellate court of a case due to a *Batson* challenge.

This is significant because prosecutors have a history of striking minorities, although they do not admit they do. History has helpful evidence. The *Kentucky Prosecutor's Handbook* (1975) issued by the Office of the Attorney General, Prosecutor's Assistance Division counseled in favor of excluding minorities as jurors, particularly potential jurors who were of ethnic or national background similar to that of the defendant who was on trial.

Former Jefferson Circuit Judge Ellen Ewing stated in a March 17, 1997 Affidavit[3] that prosecutors had used their peremptory strikes "to remove all blacks," and she discharged jury panels because of the caselaw.

The Kentucky Supreme Court considered both of these pieces of evidence in the capital case of *Taylor v. Commonwealth*, Ky., 63 S.W.3d 151 (2001) and found that there was no showing of discriminatory use of peremptories. An extensive dissenting opinion by Justice Stumbo termed the evidence presented to support the claim of discriminatory use of peremptories as impressive.[4]

The significance of improper exclusion of minorities is prominent in capital cases because the race of jurors has an outcome determinative effect on the sentence.

"In all statistical models, black jurors are significantly more likely to oppose the death penalty than are white jurors." Theodore Eisenberg, Stephen Garvey & Martin Wells, *The Deadly Paradox of Capital Jurors*, 74 Southern California Law Review371, 385 (2001).

"There is a clear 'white male effect' in capital sentencing in cases with black defendants and white victims. The presence of 5 or more white males on the jury dramatically increased the likelihood of a death sentence." William Bowers, Benjamin Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Juror's Race and Jury Racial Composition*, 3 University of Pennsylvania Journal of Constitutional Law 171, 192 (2001). "The presence of black male jurors in the same cases, by contrast, substantially reduced the likelihood of a death sentence." *Id.* "White male jurors are more likely to believe that a black defendant is dangerous and not remorseful, and are the least likely to be able to identify with the defendant in a black defendant/white victim case. Black male jurors, on the other hand, are most likely to believe the defendant is not dangerous, is sorry, and best able to identify with the defendant." *Id.* at 212-222.

"First, white jurors were more likely than black jurors to have felt anger toward the defendant. Second, white jurors were less likely than black jurors to have imagined being in the defendant's situation. Third, white jurors were less likely than black jurors to have found the defendant likeable as a person." Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 New York University Law Review 26, 46 (2000). "Black jurors on the other hand appeared more willing to separate the sin from the sinner." *Id.* at 47.

Prosecutors are required under *Batson* to provide a reason why they use a peremptory challenge to strike a minority. Judges should likewise require prosecutors, when a challenge under the RJA is made, to provide in discovery why they sought death on this defendant in this case, the factors that they considered in deciding to exercise their discretion to seek death in this case versus other cases, the data on other capital eligible cases and their decision to seek or not seek death in those cases. Just as *Batson* requires a race neutral reason why a black juror is excused, judges should be requiring prosecutors to do the same concerning the decision to seek the death penalty. Courts should also require prosecutors to reveal what policies they have concerning seeking to prosecute a case as capital. This would require prosecutors to adopt race neutral policies that do not currently exist.

The *Report of the Governor's Commission on Capital Punishment* issued by Governor George H. Ryan April 2002 had 85 recommendations including adoption of protocols on a prosecutor's exercise of discretion in seeking to prosecute a case capital and a mandatory review of death eligibility by a state-wide review committee of 4 prosecutors and a retired judge.

The 1996 Kentucky Racial Bias Task Force, the Chief Justice, and the Administrative Office of the Courts issued a Report, *Does Race Matter; Examining the Perceptions of Court-users on the Fairness of the Kentucky Courts (1997)* in part concluding that, " In the final analysis, the social problem of racial disparity continues to influence and even cloud the judiciary." *Id.* at 13.

Judges, I encourage you to take RJA claims seriously. Seek the truth based on the evidence. Look at the context. Require helpful discovery. Deliberate well and decide to rid the criminal justice system of racial discrimination in the application of the death penalty.

The Public

Kentuckians want a criminal justice system to be free of racial bias, especially when it considers capital cases. They want fair process. They want the results to be reliable. They want to know that people got a fair deal. They want to have confidence in the decisions in the criminal justice system. A 1989 statewide public opinion poll showed that 92% of Kentuckians believed that the law should guarantee that no racial bias exists in application of the death penalty. That rose to 94% in a June 1997 statewide poll of Kentuckians. This RJA responds

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to the public's desire to facilitate a process and remedy for discrimination.

Kentucky Legislature
The 2001 General Assembly passed a racial profiling bill.[5] It required the development of a policy for Law Enforcement.[6] The first set of statistics collected have been released by the Kentucky Justice Cabinet. The statistics must be mined for an understanding of where racial profiling exists in Kentucky and why it exists.

Conclusion
We could proclaim that race has nothing to do with our Kentucky criminal justice system. We could argue that race is never inappropriately used in the prosecution of a capital case in our Commonwealth. But we know, especially when we consider the historical context and the relevant studies, the reality is quite different. Race is a multifaceted, complicated, complex problem in our Kentucky criminal justice system which prides itself on fair process and reliable results no matter who you are or what you look like. We do not like to think about race, talk about race, or tackle what we have to do to eliminate racial discrimination in our criminal justice system. But we must. We must or we are doomed to the ignoble past.

There should be an effective process and remedy when a sentence of death is sought or imposed due to racial discrimination. Prosecutors, judges and defenders should embrace that process and remedy.

George C. Wright in *Racial Violence in Kentucky: Lynchings, Mob Rule, and "Legal Lynchings," 1865-1940* tells us that the racial violence discussed in his book "has ended for the most part. Steps taken by concerned government officials and by black and white civic leaders have proven over time to be sufficient to eradicate the acts of mobs. Even though they still lack total equality before the law, black Kentuckians are no longer tried in courthouses where white mobs are clamoring for the death penalty and heavily armed soldiers surround the building, closely checking each person entering the courtroom. Their trials last much longer than an hour, and jurors take longer than five minutes to render verdicts. The mental state of the accused is also considered. All of this can be viewed as progress; we as a nation no longer allow people to be lynched inside or outside the courtroom. We as Americans tend to applaud ourselves for doing the "right thing," for extending to the accused person the right to defend himself and to challenge fully his accusers in court. Many people do not want to be reminded of a time when racial violence was rampant; they think this is too negative and dwells on only the worst aspects of society. Regardless, it is extremely important to remember that Kentuckians and Americans consistently went to great extremes to deny blacks their most fundamental rights. Centuries of judicial prejudice and mob violence are not erased quickly. Within our society the dangers still remain, dormant perhaps, but present nevertheless. If we understand the past evils, and are reminded of them, perhaps such evils will stay as they should be, behind in the past." *Id.* at 304-305.

Regrettably, we now know that the dangers of racial discrimination in Kentucky's criminal justice system are not dormant. They are not relics of the past. They are present today, with sophistication not previously seen. They rage with new, stealthy insidiousness.

But people of good will are working to remedy the racial discrimination that remains in today's criminal justice system. The 1998 Racial Justice Act has passed. It is law. It is a symbol and its substance is beginning to be realized. The criminal justice system is strengthened by having a focused process to insure race is not a part of its outcomes. The work of equal justice for all continues.

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Racial Justice Act: Capital Trial of African-American in Barren County Results in Life Without Parole Sentence

Nate Wood, an African-American, was tried in Barren County from April 22t o May 23, 2003 on allegations of kidnapping and killing his former girlfriend in the daytime on a busy street in downtown Glasgow, and for breaking into a home and taking an elderly hostage after leaving the scene. The level of pretrial publicity and community interest and discussion was constantly high during the case. Nearly everyone in the community had knowledge of the case, and a large segment seemed to have settled and extremely hostile views about Mr. Wood. The case was universally regarded as shocking and disturbing, even by those with no preconceived views that Mr. Wood should receive a death sentence. A defense motion for a change of venue was denied. Barren County is a small, predominately rural community where African-Americans constitute about 4.5% of the population. The Commonwealth moved for severely limited individual voir dire, even seeking an order mandating that certain questions be asked, and no others. The defense filed the following Racial Justice Act motion, asking for several remedies including individual voir dire sufficient to deal with the reality of racial discrimination. There was a hearing on the motion that seemed inconclusive and, initially, somewhat disappointing. The Court refused to exclude death as a sentence, and the Judge appeared to counsel to be somewhat irritated that the motion had been filed. The Court did, however, ultimately provide for voir dire that recognized the context of the case. Voir dire lasted three and one half weeks and was searching and deliberate. After a trial of 6 days, the jurors convicted Mr. Wood of wanton murder and capital kidnapping and after a sentencing hearing the jurors sentenced him to life without parole. *See The Advocate*, No. 5, Volume 25, September 2003 at http://dpa.ky.gov/library/advocate/sept03/racialjustice.htm for a motion by Rob Sexton.

FOOTNOTES

1. Racial Profile of Kentucky's Inmate Population
All Institutions: Kentucky Department of Corrections Profile of Inmate Population (January 2003)

Race	Number	Percent
White	10,654	67
Black	5,093	32
Native American	6	
Asian	11	
Hispanic	146	1
Other	24	
Total	15,934	100

Comparison of Profiles Percentage of Institutional Population

	KSP	EKCC	GRCC	KCIW	KSR	LLCC	NTC	RCC	WKCC	BCFC	BCC	FCDC	LAC	MAC	A&C	CD	CSC	CC	CI	TOT
White	65	67	64	71	72	67	54	61	71	70	58	49	60	58	58	76	59	58	78	67
Black	34	32	35	29	26	32	43	39	28	30	41	51	39	42	41	22	41	42	21	32
Violent	67	59	54	38	47	45	54	33	33	47	30	37	45	34	26	20	16	12	14	39
Sex	11	14	13	4	31	27	11	4	33	0	0	0	6	--	6	--	--	0	5	11
Drug	7	10	16	32	10	12	17	29	21	28	40	41	26	38	33	27	56	59	33	23
Weapon	1	1	1	1	1	1	2	1	2	3	2	2	2	2	2	1	2	1	1	1
Property	13	15	14	23	10	14	15	32	12	22	25	19	20	24	27	40	24	23	34	22
Misc.	1	1	2	2	1	1	1	1	1	1	3	2	1	1	4	11	2	5	5	3
Unkown Offiense	1	--	--	0	--	--	0	0	--	0	0	0	--	0	2	0	0	0	9	1
Median Sentence	17	14	12	8	13	12	13	9	10	10	10	11	10	10	7	4	10	7	5	10
Median Age	34	32	34	36	40	35	32	30	34	30	38	39	30	32	31	31	33	34	30	33

(— less than 1%)

Above Abbreviations:

Maximum Security
KSP: Kentucky State Penitentiary

Medium Security
EKCC: Eastern Ky Correctional Complex
GRCC: Green River Correctional Complex
KCIW: Ky Correctional Institute for Women
KCPC: Ky Correctional Psychiatric Center
KSR: Ky State Reformatory
LLCC: Luther Luckett Correctional Complex
NTC: Northpoint Training Center
RCC: Reederer Correctional Complex
WKCC: Western Ky Correctional Complex

Private Prisons
LAC: Medium Security: Lee Adjustment Center
MAC: Minimum Security: Marion Adjustment Center

Other
A&C: Assessment & Classification Center
CD: Class D Felon
CSC: Community Services Centers
CC: Community Custody
CI: Controlled Intake
CM: Contract Medium

2. Currently, there are 7 African-Americans on Kentucky's death row of 34.

3. The Affidavit of March 17, 1997 states:

Comes now the Affiant, Ellen B. Ewing, and states as follows, having first been duly sworn;

I am a circuit judge in the Jefferson Circuit Court, I have been on the circuit bench for 13 years.

Prior to the United States Supreme Court decision in *Batson v. Kentucky*, I discharged a petit jury panel because the prosecution had used its peremptory strikes to remove all black persons from the panel. In that case, the prosecution did not use all of the peremptory strikes available to it.

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One reason I discharged that panel was my awareness that the Commonwealth had in other prior cases also elected to utilize strikes to remove all blacks. I had decided to research whether such practice was constitutionally permissible. By the time of the trial in which I discharged the panel, such practice was an issue of increasing concern to me. My research convinced me there was caselaw to rely upon in discharging such a panel.

Further affiant sayeth not. Hon. Ellen B. Ewing

4. The dissent in *Taylor v. Commonwealth,* Ky., 63 S.W.3d 151, 171 (2001) states: "Taylor produced very impressive evidence in support of his claim that the Commonwealth Attorney violated his right to equal protection of law by using peremptory strikes to remove African-American jurors from the jury venire solely on account of the jurors' race. The evidence presented included:

(1) Passages from the *Kentucky Prosecutor's Handbook* that stated that the following were not "preferable" jurors for the prosecution: (1) a juror who came from a "[m]inority group[ ] who may have a grudge against law enforcement;" and (2) a "juror of racial or national background to that of the defendant."

(2) Observations by a then-sitting Jefferson Circuit Judge that she discharged a panel in a particular case because the Commonwealth Attorney used peremptory strikes to remove all black jurors on the venire and because of her "awareness that the Commonwealth had in other prior cases also elected to utilize strikes to remove all blacks."

(3) The testimony of a former Jefferson County public defender that he had observed a pattern and practice of the Commonwealth using peremptory strikes to remove blacks from jury venires.

(4) The testimony of a private attorney that he had observed the same pattern and practice on behalf of the Commonwealth in "dozens and dozens of murder cases, many of which had been tried capitally."

(5) The testimony of a former staff attorney who worked for the Jefferson County Commonwealth Attorney, who testified that it was understood in the office that prosecutors should strive to strike jurors with the same ethnic background. Further, she testified that it was common knowledge that the same Commonwealth Attorney who prosecuted Taylor's case—who is also African- American—believed that blacks on the jury panel were bad.

5. 15A.195 Prohibition against racial profiling — Model policy — Local law enforcement agencies' policies.

(1) No state law enforcement agency or official shall stop, detain, or search any person when such action is solely motivated by consideration of race, color, or ethnicity, and the action would constitute a violation of the civil rights of the person.

(2) The secretary of the Justice Cabinet, in consultation with the Kentucky Law Enforcement Council, the Attorney General, the Office of Criminal Justice Training, the secretary of the Transportation Cabinet, the Kentucky State Police, the secretary of the Natural Resources and Environmental Protection Cabinet, and the secretary of the Public Protection and Regulation Cabinet, shall design and implement a model policy to prohibit racial profiling by state law enforcement agencies and officials.

(3) The Kentucky Law Enforcement Council shall disseminate the established model policy against racial profiling to all sheriffs and local law enforcement officials, including local police departments, city councils, and fiscal courts. All local law enforcement agencies and sheriffs' departments are urged to implement a written policy against racial profiling or adopt the model policy against racial profiling as established by the secretary of the Justice Cabinet within one hundred eighty (180) days of dissemination of the model policy. A copy of any implemented or adopted policy against racial profiling shall be filed with the Kentucky Law Enforcement Council and the Kentucky Law Enforcement Foundation Program Fund.

(4) (a) Each local law enforcement agency that participates in the Kentucky Law Enforcement Foundation Program fund under KRS 15.420 in the Commonwealth shall implement a policy, banning the practice of racial profiling, that meets or exceeds the requirements of the model policy disseminated under subsection (3) of this section. The local law enforcement agency's policy shall be submitted by the local law enforcement agency to the secretary of the Justice Cabinet within one hundred eighty (180) days of dissemination of the model policy by the Kentucky Law Enforcement Council under subsection (3) of this section. If the local law enforcement agency fails to submit its policy within one hundred eighty (180) days of dissemination of the model policy, or the secretary rejects a policy submitted within the one hundred and eighty (180) days, that agency shall not receive Kentucky Law Enforcement Foundation Program funding until the secretary approves a policy submitted by the agency. (b) If the secretary of the Justice Cabinet approves a local law enforcement agency's policy, the agency shall not change its policy without obtaining approval of the new policy from the secretary of the Justice Cabinet. If the agency changes its policy without obtaining the secretary's approval, the agency shall not receive Kentucky Law Enforcement Foundation Program funding until the secretary approves a policy submitted by the agency.

(5) Each local law enforcement agency shall adopt an administrative action for officers found not in compliance with the agency's policy. The administrative action shall be in accordance with other penalties enforced by the agency's administration for similar officer misconduct.

Effective: June 21, 2001; History**:** Created 2001 Ky. Acts ch. 158, sec. 1, effective June 21, 2001.

6. MODEL KY RACIAL PROFILING POLICY Pursuant to KRS 15A.195 POLICY

The protection of, and the preservation of the constitutional and civil rights of individuals remains one of the paramount concerns of government, and law enforcement in particular. To safeguard these rights, law enforcement personnel shall not engage in any behavior or activity that constitutes racial profiling. The decision of an officer to make a stop or detain an individual, or conduct a search, shall not be solely motivated by consideration of race, color, or ethnicity. Stops, detentions, or searches shall be based on articulable reasonable suspicions, observed violations of law or probable cause, and shall comply with accepted constitutional and legal provisions, and with the Code and Cannon of Ethics adopted by the Kentucky Law Enforcement Council through Peace Officer Professional Standards.

Definitions For purposes of this policy:

"Racial Profiling" means a process that motivates the initiation of a stop, detention, or search which is solely motivated by consideration of an individual's actual or perceived race, color, or ethnicity, or making discretionary decisions during the execution of law enforcement duties based on the above stated considerations. Nothing shall preclude an officer from relying on an individual's actual or perceived race, color, or ethnicity as an element in the identification of a suspect or in the investigation of a crime, a possible crime or violation of law or statute.

Training All officers shall complete the Kentucky Law Enforcement council approved training related to racial profiling. Such training shall comply with Federal Law, state statutory provisions, case law and other applicable laws, regulations, and established rules.

Discipline An officer who violates a provision of this policy shall be subject *to* the agency's disciplinary procedures, which shall be consistent with other penalties imposed for similar officer misconduct. ■

A Refresher Course on *Brady*: The Law is Better Than You Think – Here's Some Creative Ways to Use It

As a free-lance public defender, I am fortunate in that my practice allows me to work on cases with fine defenders all over the country. This in turn permits me to compare trends in the criminal justice systems of many different states and courts. Over the past few years, it has become obvious to me that we are in the midst of a national epidemic of *Brady* violations. Good defenders everywhere report that the situation is so extreme that when preparing for trial they simply assume that the State is concealing exculpatory evidence. Most of the time, they are not disappointed. A random sample of cases I have litigated or observed includes:

- A West Virginia kidnapping case where the State neglected to mention a witness who told police that immediately before leaving a bar with the defendant, the alleged victim introduced the defendant to the witness, and said that he was taking the defendant home with him.
- A New York federal case in which the Government simply lied about making a deal with their snitches.
- A District of Columbia case in which authorities were supplying imprisoned witnesses with sex and drugs in the courthouse as an incentive to keep their testimony favorable.

A brief tour through the relevant key numbers of any state or regional Digest (Criminal Law Key #700 is a good place to start) reveals that hundreds, if not thousands of these cases come up every year. They are not confined to any state or region or county. No one has a monopoly on prosecutorial misconduct. In this respect, no matter where we practice, we are in a bad jurisdiction.

It would take a good sociologist, or perhaps a psychologist to explain why *Brady* violations have become such a common part of the legal landscape. Perhaps it is because criminal cases have become so politicized that a win-at-all-costs mentality is beneficial to a prosecutor's career. Perhaps it is because the present generation of prosecuting lawyers has grown up watching television and movies that glorify prosecutorial misconduct.

Regardless of the reason for the epidemic of *Brady* problems, we as defenders must realize that there are things we can do to stop some of these abuses, and other things we can do to win in spite of them. This article recommends three steps for defenders who want to improve their success in litigating exculpatory evidence issues:

1. Become familiar with the specific legal principles that form the basis for all *Brady* cases. This does not mean just understanding the general nature of *Brady* – that the State has a Due Process obligation to turn over exculpatory evidence – but understanding exactly what is meant by *Brady* material, and knowing exactly how the disclosure rules work.
2. Recognize the most common situations in which exculpatory evidence is concealed. Then investigate thoroughly and be aggressive in pushing for disclosure every time those situations come up in your cases.
3. Learn to present *Brady* claims in a persuasive, factual way at both the trial and appellate levels. Although harmless error is not a legal bar to *Brady* issues, common sense tells us that unless we can convince a judge that our client is harmed by the withholding of exculpatory evidence, we are not going to win very many cases.

I. The Basics of *Brady* Law

What is *Brady* Material?

Brady material is anything (a witness, a statement, a document, a piece of physical evidence, or anything else you can imagine) that is:

- Favorable to the accused (and)
- Within the knowledge or possession of anyone acting on behalf of the State (and)
- Relevant and material to either guilt or punishment

Let's break this down into its component parts:

A. Favorable to the Accused

This means that the concealed evidence fits within one of three general categories:

It is exculpatory
It can be used to impeach a prosecution witness
It may mitigate sentence if the defendant is found guilty

Let's review each of these categories in turn:

√ **It is exculpatory**. The withheld evidence tends to show that the defendant is not guilty, or is guilty of only a lesser offense. Exculpatory evidence can include:

- Evidence tending to show that the defendant did not commit one or more elements of the crime.

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- Evidence that the defendant was not the person who committed the crime. This could include: failure of a witness to identify the defendant in a line-up, show-up, photo array, or at the scene of the crime; evidence that a witness identified someone else as the criminal; evidence that a witness affirmatively excluded the defendant.
- Evidence that helps establish a defense or an affirmative defense to the charge. This could include: evidence that the "victim" instigated the fight (self-defense), evidence that the defendant was insane, evidence that the defendant was coerced, etc.
- Evidence that the defendant was not guilty of the higher crime charged, but was guilty of a lesser offence. This could include evidence that the defendant was drunk (murder to manslaughter), evidence that stolen property was of a lesser value (felony larceny to misdemeanor larceny), evidence that the defendant was under extreme emotional stress (murder to manslaughter), etc.
- Anything inconsistent with the State's theory of the case.

Here's another suggestion for identifying material that is exculpatory, and therefore satisfies the *Brady* requirement of being favorable to the accused: Several excellent public defender trainers and teachers, including Cathy Kelly, Terry Harper and Steve Lindsay, have listed categories of defense types, also known as "genres," which form the basis for virtually all theories of defense that we present to juries. These genres include:

- It never happened
- It happened, but I didn't do it
- It happened, I did it, but it wasn't a crime
- It happened, I did it, it was a crime, but it wasn't this crime
- It happened, I did it, it was the crime charged, but I'm not responsible

If the prosecution is withholding any material that would help you establish any of these genres, there is a good chance that the material is exculpatory, and comes within the scope of *Brady*.

√ **It can be used to impeach a prosecution witness.** A lot of judges and prosecutors don't know that anything that can be used for impeachment must be turned over pursuant to *Brady*. It is our job to make them aware of this principle. The U.S. Supreme Court cases that explicitly say this are *Strickler v. Greene*, 527 U.S. 263 (1999) ("The due process duty of the prosecution under *Brady* . . . encompasses impeachment evidence as well as exculpatory evidence") and *United States v. Bagley*, 473 U.S. 667 (1985) ("our cases make clear that *Brady's* disclosure requirements extend to material that, whatever their other characteristics, may be used to impeach a witness."). We must also keep in mind that the requirement to disclose impeachment material is not limited to prior inconsistent statements by the witness you want to impeach. It includes anything made, compiled, done or said by *anyone* that impeaches the witness.

Some good general guidelines to determine what is impeachment material are:

- Anything inconsistent with the testimony of a State's witness. Remember that the State's duty to disclose under *Brady* is a continuing duty, so if a prosecution witness says something during trial that is contradicted by anything in the State's possession or knowledge, the prosecutor's duty kicks in immediately, and disclosure must be make immediately.
- Any prior statements by the witness omitting something the witness later told the State or testified to.

√ **It may mitigate sentence if the defendant is found guilty.** It is important to remember that *Brady* material is not limited to things that will help the defense get a not guilty verdict. Anything that will help the defendant get a lesser sentence also must be disclosed – even if it is something that at the guilt/innocence part of the trial might show that the defendant is guilty. Caselaw concerning capital sentencing is a very good place to find ideas for material that might be subject to *Brady* disclosure as mitigating of sentence. Courts have taken a very expansive view of what is admissible at the mitigation phase of a capital trial. Anything that a court has deemed to be admissible as a mitigating factor is subject to *Brady* if it happens to be within control of the State. Another good source of ideas for things that are sentence mitigators is a recent study done by John Blume at Cornell Law School, entitled, *An Overview of Significant Findings From the Capital Jury Project and Other Empirical Studies of the Death Penalty Relevant to Jury Selection, Presentation of Evidence and Jury Instructions in Capital Cases*. This study identifies and discusses numerous factors that jury studies have determined to be considered mitigating by jurors in capital cases. Finally, keep in mind that *Brady* disclosure of mitigators is required even if you do not have a capital case, because the same things that mitigate towards a non-death sentence also mitigate towards a lesser prison term in non-capital cases.

B. Within the Knowledge or Possession of Anyone Acting on Behalf of the State

This means anything that falls into one of these categories:

- ♦ Anything actually known to the prosecutor's office
- ♦ Anything that is actually known to the police, even if the prosecutor doesn't know about it.
- ♦ Anything that is actually known to anyone else acting on behalf of the State, even if the prosecutor doesn't know about it.

It is crucial to understand that as long as material falls into one of these categories, it makes no difference that the trial prosecutor (or anyone else in his or her office) did not personally know that the material existed. In fact, the U.S. Supreme Court has explicitly held that "[t]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419 (1995).

C. Relevant and Material to Guilt or Punishment

When *Brady* issues are raised at trial, this requirement is essentially subsumed in requirement (A), that the material be favorable to the defense.

However, when *Brady* issues are raised on appeal, this requirement, often categorized under the general heading of "materiality," expresses the standard of review we must meet to gain a reversal. In this context, "materiality" refers to the stringent standard that a conviction will only be reversed on *Brady* grounds if there is a reasonable probability that the withheld exculpatory material, had it been available to the defense at trial, would have resulted in a different verdict or sentence. This is a very difficult standard to meet.

It is important to keep in mind, however, that this standard is only applicable to measure the need for a reversal when a *Brady* claim is raised on appeal or in post-conviction. It is not the standard that measures whether the prosecution had a duty to turn the material over at trial. Thus, if prior to or during trial you find that the State has *Brady* material it is refusing to turn over, the standard that determines whether they have to give it to you is simply whether it is exculpatory, and in their possession. If that standard is met, the judge must turn it over to them without making any determination about whether it will result in an acquittal.

One other matter should be borne in mind about the standard of proof when a *Brady* violation is alleged on appeal or post-conviction. The "reasonable probability that the verdict would have been different" test is very hard to satisfy. But there are other, less stringent standards that might be applicable. For example, if you are claiming on appeal or post-conviction that the prosecutor introduced false evidence, had a witness testify falsely, or stood by silently while a State's witness lied on the stand, *Giglio v. United States*, 405 U.S. 150 (1972) or *Napue v. Illinois*, 360 U.S. 264 (1959) might apply. If the State has run afoul of *Giglio* or *Napue*, the conviction must be reversed "if there is a reasonable possibility that the violation could have affected the jury's deliberations." This is much easier to meet than the "reasonable probability of a different verdict" standard of *Brady*.

One situation where this often occurs is when the State's witness testifies that he has not been given any consideration in return for his testimony. After trial, you find out that he has indeed been given a favorable deal for a reduced sentence on another case — something the prosecutor never disclosed before or during trial. When this happens, there is certainly a *Brady* claim for the State's failure to disclose the deal. There is also a *Giglio/Napue* claim, because the State offered false testimony and did nothing to correct it during trial when the witness lied. Obviously, we should raise both claims on appeal and/or in post-conviction. However, it is essential to include the *Giglio* or *Napue* claim because the standard for reversal in those situations is much easier to meet than the standard for *Brady* violations.

II. Where Do We Usually Find *Brady* Material? And How Do We Find It?

A. Make a Written Demand for *Brady* Material

There is no legal requirement that defense counsel make a demand for *Brady* material. The State has a Due Process obligation to find and disclose it regardless of whether the defense lawyer did anything. However, it is an excellent idea to make as complete and specific a demand as possible prior to trial for several reasons:

- It puts the prosecutor on notice of what to look for. Even honest prosecutors may sometimes get so wrapped up in believing their own witnesses that they don't recognize what a more objective person would realize is *Brady* material.
- It lets the prosecutor and judge know that the defense is not asleep. This might deter the less ethical prosecutor or judge from committing violations.
- It seizes the moral high ground for your argument if you later discover that the State did withhold some *Brady* material. It is much more effective on appeal or post-conviction to be able to show that the State was on notice of what they should be disclosing, rather than having to convince a reviewing court that the State should have recognized on its own what should be disclosed.

Don't just submit the same canned *Brady* demand in every case. Tailor your demand to the specific facts of your case, and try to anticipate what material might exist that the State might be concealing.

B. Renew the Demand After the Direct Examination of Every State's Witness

The purpose of this demand is to put the State and the court on notice, and to set up a possible *Giglio/Napue* claim if it turns out that the witness testified falsely.

C. Renew the Demand At Sentencing

The purpose of this is to set up any possible *Brady* claims regarding the withholding of material that might be favorable to the defense on sentencing. It also helps lay the foundation for a possible *Giglio/Napue* claim if it turns out

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that any of the State's cooperating witnesses lied about your client's relative culpability or degree of responsibility in a multi-defendant case.

III. Presenting Your *Brady* Claim Persuasively

Start by Reading *Kyles*, Finish By Arguing Factually

For two reasons, *Kyles v. Whitley*, 514 U.S. 419 (1995) might be the most important defense case handed down by the Supreme Court in more than a generation.

First, *Kyles* contains a laundry list of subjects that the U.S. Supreme Court now considers to be *Brady* material, many of which in the past have been rejected by state courts. Misidentifications, failure of a witness to make a positive identification, inconsistent descriptions, failure of the police to follow other leads, conversations between police, prosecutors and witnesses, changes in the testimony of prosecution witnesses between trials or between hearings and trials – all can now fall under the heading of *Brady*. Moreover, the Court in *Kyles* demolished some of the most common excuses the State uses to avoid obeying *Brady*: "we didn't know about it," "the police didn't tell us," "each individual item was not that prejudicial," "there was still enough other evidence to support the verdict," "the *Brady* violation was harmless," – each of these excuses was considered by the Supreme Court in *Kyles* and rejected as a matter of law. ***It is essential for all defenders to read Kyles and cite it – not just for its general legal principles, but for the way it dealt with the same facts that come up over and over again in our cases.***

Second, it is crucial for us to acknowledge that *Kyles* was reversed not because of any legal argument – indeed, Justice Scalia is correct in his dissent when he insists that *Kyles* is a purely fact-based case in which there are no novel legal principles. Rather, *Kyles* was won because the defense team convinced a majority of the Court that Curtis Kyles was innocent, and that a jury would have found him innocent if the State had not cheated.

In a strictly legal sense, harmless error analysis does not apply to appellate review of *Brady* violations. If the concealed evidence was material, favorable to the defense, and within the possession of the prosecution team, the conviction must be reversed without even considering the issue of harmlessness. On a human level, however, we all know that a court will dismiss a *Brady* claim without even thinking twice (or once, for that matter) unless we convince the court that the violation made a difference in the trial. For that reason, it is essential that we don't litigate *Brady* cases as legalistic exercises. Our brief must be about how the violation caused an injustice, and how on a factual level, we were hurt at trial (and the jury was mislead) because we did not have the concealed evidence. If we can make this kind of argument, we are going to win some cases that we would otherwise lose. ■

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RECRUITMENT OF DEFENDER LITIGATORS

Al Adams

The Kentucky Office of Public Advocacy is recruiting for staff attorneys to represent the indigent citizens of the Commonwealth of Kentucky, and support staff positions in the following locations:

Columbia	London
Frankfort	Madisonville
Hazard	Murray
Henderson	Paducah

Further information about Kentucky public defenders is found at: http://dpa.state.ky.us/

Information about the Louisville-Jefferson County Public Defender's Office is found at: http://dpa.state.ky.us/louisville.htm

For further information and employment opportunities, please contact:

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ELECTRONIC RECORDING OF INTERROGATIONS: AN EFFICIENT, EFFECTIVE MEASURE TO INCREASE PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM

> "[O]ne simple use of technology served the disparate interests of efficiency, effectiveness and legitimacy" William Geller, "Police Videotaping of Suspect Interrogations and Confessions,' Report to the National Institute of Justice, 1992.

In the current session of the General Assembly, Kentucky is debating the issue of requiring law enforcement to make an audio or videotape of all interrogations of felony suspects. Dozens of states have considered or are currently discussing this issue in their legislatures. Illinois, Alaska, Minnesota, numerous local jurisdictions including Austin, Denver, San Diego County, Broward County and Portland, Maine currently employ the practice.

Twenty-seven of the first 111 people sentenced to death and then exonerated by DNA had made false confessions. Mentally retarded, mentally ill, juvenile and poorly educated suspects are particularly vulnerable to making false confessions when confronted with powerful interrogation tactics. Recent high profile cases such as the Central Park Jogger Case and the case of Michael Crowe made into a movie by CourtTV demonstrate the need for commonsense reform to protect the innocent from over-zealous and even well intentioned interrogators.

Electronic recording of interrogations not only protects the innocent, it serves the interests of everyone in our justice system:

1) Serves The Interests of Law Enforcement and Judiciary By:
- Strengthening prosecution cases
- Preventing wrongful convictions based on false/coerced confessions
- Minimizing lengthy and costly appeals
- Protecting law enforcement agencies from false allegations of misconduct
- Improving the overall efficiency of the legal process
- Lessening number of lengthy suppression hearings
- Increasing public confidence
- Providing judges with better documented evidence
- Providing appellate courts with a clear record for review

2) Ensures the Guilty Are Punished and the Public is Protected By:
- Providing clear evidence of voluntariness of statements
- Removing any doubt of what was said and why
- Identifying false confessions and admissions quickly so that law enforcement can find the actual offender(s)

Jeff Sherr

3) Protects the Innocent By:
- Preventing erroneous convictions based coerced statements
- Alerting judges and juries to the vulnerabilities of particular defendants (like impressionable juveniles and those with mental retardation or mental illness)
- Eliminating excessively coercive interrogation techniques
- Helping to ensure law enforcement complies with Miranda
- Exposing over-zealous police officers

The minimal cost of providing recording equipment to the rare police force which does not already have video cameras is easily offset by reducing false arrest and police misconduct lawsuits, lowering then number of suppression hearings and encouraging more plea agreements.

For more information

The Innocence Project
http://www.innocenceproject.org/causes/falseconfessions.php

John A. Birdsall, Criminal Law News, State Bar of Wisconsin Criminal Law Section, Vol. 25, No. 1, Winter 2003
http://www.wisbar.org/sections/criminal/news/2003winter.pdf

Electronic Recording of Interrogations, Center for Policy Alternatives, 2004 Policy Summary (*includes Model Electronic Recording of Interrogations Act*)
http://www.stateaction.org/2004agenda/12.pdf

William Geller, "Police Videotaping of Suspect Interrogations and Confessions" Report to the National Institute of Justice, 1992. ■

Jeff Sherr
Education and Strategic Planning Manager

ABA Endorses Videotaping of Custodial Interrogations

On Monday, February 9, the ABA House of Delegates unanimously officially urged law enforcement agencies, legislatures and/or courts to require that the entirety of all custodial interrogations be videotaped. The official ABA policy, as approved, is as follows:

"RESOLVED, That the American Bar Association urges all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of such custodial interrogations.

FURTHER RESOLVED, That the American Bar Association urges legislatures and/or courts to enact laws or rules of procedure requiring videotaping of the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to require the audiotaping of such custodial interrogations, to provide necessary funding, and to provide appropriate remedies for non-compliance."

Three states already require taping: Illinois, Alaska and Minnesota. ■

2004 Kentucky General Assembly's HB 390 - Electronic Recordings of Interrogations

HB 390/CI (BR 1325) - L. Napier, J. Adams, S. Baugh, T. Burch, Dw. Butler, P. Clark, H. Cornett, B. Crall, C. Embry Jr, T. Feeley, D. Ford, J. Jenkins, M. Marzian, A. Simpson, K. Stein, T. Turner, C. Walton, J. Wayne, R. Webb

AN ACT relating to criminal law.

Create a new section of KRS Chapter 455 to require that all felony interrogations be recorded; allow for use of the recording at trial by both the prosecution and defense, establish control over the use of taped interrogations outside court proceedings, and set a schedule for destruction of recordings. ■

Loan Assistance Endorsed by KBA

February 2004 Resolution of the Board of Governors of the Kentucky Bar Association

WHEREAS, the Legislative Policy and Procedure of the Kentucky Bar Association (KBA) provides that the Board of Governors may state positions on legislation in the General Assembly; and,

WHEREAS, the Board of Governors must, in order to take a position on any proposed legislation, conclude by a minimum of two-thirds majority vote that the legislative proposal is within the mission and purpose of the KBA as set forth in Supreme Court Rule (SCR) 3.025; and,

WHEREAS, on January 16, 2004, during a regular meeting, the Board of Governors concluded that the proposed legislation, since introduced as House Bill 483 in the 2004 General Assembly, to create the Public Service Student Law School Loan Assistance Program, is within the mission and purpose of SCR 3.025; and,

WHEREAS, during the same regular meeting on January 16, 2004, the Board of Governors, by appropriate vote, approved endorsement of House Bill 483.

NOW, THEREFORE, the Board of Governors of the Kentucky Bar Association calls upon the House of Representatives and Senate of the Kentucky General Assembly to pass House Bill 483 in the 2004 General Assembly in order to encourage members of the legal profession to participate in public service employment by offering a mechanism to assist with repayment of student law school loans. ■

THE SUBPOENA: ITS USE AND MYTH-USE

B. Scott West

The subpoena is arguably the most important pre-trial document available to the criminal defense attorney. To win cases, you need witnesses. To secure the attendance of witnesses, you need subpoenas. While Mom, Dad, siblings, uncles, aunts, cousins and close friends – because of their close relationship with the defendant – can often be counted on to show up at trial without a subpoena, sometimes there are other witnesses who will show up only if subpoenaed, and then maybe, not even then.

It might be the *reluctant* witness, the one who does not want to get involved, or feels that he may already be involved too deep, for whom the subpoena is so important. Or maybe she is a *hostile* witness, who has information favorable to your client's case, but will not voluntarily lift the slightest finger to help him. Or maybe she is a *records custodian*, knowing nothing herself, but having possession of critical documents. Or maybe he is an *unrelated, disinterested bystander,* quite willing to testify – he just needs a valid subpoena to get an excused absence from work

In any of these events, your subpoena practice must not be sub-par; because failure to properly abide by the rules can leave your subpoena invalid, or worse, illegal. Then when your witness is a no-show at trial, you do not get a continuance, and the Sheriff is not ordered by the Court to fetch the witness. You have to proceed without the testimony.

That may be the best thing that happens. Some misuses of a subpoena might lead to disciplinary action by the Bar Association. The subpoena is, after all, an order of the court, and it should therefore be handled with care. To avoid potential professional embarrassment – or worse – the attorney must know both the proper ways to use a subpoena, but should also be aware of the myths which lead to improper usage.

Proper use of a subpoena in a criminal case begins with Rule of Criminal Procedure 7.02; but it does not end there. The defense lawyer should also be aware of Civil Rule 45 and KRS 422.300 - 330, which has particular application to subpoenaing medical records and custodians. Knowing and following these may help you avoid myth-using the subpoena in one or more of the following ways:

Myth No. 1: I can subpoena people to my office.

With the exception of subpoenas to court-ordered depositions, no, you cannot subpoena persons to places to your office or anywhere outside the courtroom. Rule 7.02(1) provides in pertinent part: "Subpoenas are issued by the clerk. It shall state the name of the court and title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein."

The rule specifically requires the title of the proceeding if there is one to be included on the form subpoena. The proceeding may be a court or jury trial, a suppression hearing, or *Daubert* hearing, or any other type of proceeding. If the proceeding does not have a title, that's okay – but the rule clearly implies that there MUST be a proceeding.

Civil Rule 45, which governs subpoenas in civil cases, is more explicit. CR 45.01 provides that "[s]ubpoenas shall not be used for any purpose except to command the attendance of the witness and production of documentary or other tangible evidence at a deposition, hearing or trial." This provision lends support to the implication of RCr 7.02. Since RCr 13.04 applies the Rules of Civil Procedure in a criminal case so long as they are not superseded by or inconsistent with the Rules of Criminal Procedure. In this instance, CR 45.01 would be interpretive, not inconsistent, with the criminal rule.

In *Munroe v. Kentucky Bar Assocation*, Ky., 927 S.W.2d 839 (1996), a lawyer was sanctioned in part because, in a divorce case, she subpoenaed the couple's insurance agent to her office without any notice of deposition or hearing date being sent to opposing counsel. In this instance, the attorney admitted the wrongdoing, but stated that she "used the ex parte subpoena to obtain information regarding her own client's home insurance policy, information known to opposing counsel." The opinion does not state whether the Court thought this explanation was mitigating.

The rule against subpoenaing witnesses to places outside the courtroom applies equally to government attorneys. In *Durbin v. United States*, 221 F.2d 420 (D.C. Cir. 1954), an Assistant U.S. Attorney subpoenaed a witness to his office on four different dates, ostensibly to call the witness before a grand jury which had been convened. However, despite several interviews which culminated in two written statements, the witness never appeared before the grand jury. This was found to be a misuse of the subpoena process.

Again, in *United States v. Standard Oil Co.*, 316 F.2d 884, 897 (7th Cir. 1963), the "government was issuing subpoenas to compel witnesses…to come, not to the courtroom, but to the United States Attorney's office at hours when the court

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was not in session." These witnesses were then interrogated. The court found this to be an abuse of the subpoena process.

While both of the above cases are federal cases, the outcome should be the same should the same for a violation of Kentucky RCr 7.02(1), which, after all, is borrowed from (and quotes exactly) the pertinent language of Rule 17 of the Federal Rules of Criminal Procedure which requires a "proceeding."

Perhaps the most persuasive authority that subpoenaing documents to one's office is the recent ethics opinion issued by the Kentucky Bar Association. In Ethics Opinion KBA E-423, the Bar addressed this exact issue, phrased as follows:

> May a lawyer use a subpoena to compel the attendance of a witness at a pretrial court proceeding and then, after service, invite the witness to make a statement or execute an affidavit in the requesting lawyer's office without notice to opposing counsel, where required, and thereafter relieve the witness of the obligation to appear at the court proceeding?

The answer was "no," essentially for the reasons stated above. Failure to subpoena someone to a "proceeding," where in fact there is no proceeding, can subject the lawyer to sanctions for violation of Rule of Professional Conduct 8.3(c), specifically "by engaging in conduct involving dishonesty, deceit and misrepresentation." Yet, there is an abundance of anecdotal evidence of prosecutors doing just that. This writer is personally aware of one Commonwealth Attorney being reprimanded by a Circuit Judge for subpoenaing witnesses to his office.

On a different occasion, I witnessed a hearing where the issue was whether the Commonwealth Attorney could subpoena reluctant witnesses to his office. (I do not know whether he had filed a motion asking for permission in advance, or whether he had attempted to subpoena a witness and defense attorney was objecting.) At the hearing, he implored the Court to allow him to use the subpoena for that purpose. "There has to be some way I can make them talk to me!"

The defense attorney replied "Your Honor, I have spent the last 25 years having doors slammed in my face by witnesses who didn't want to talk to me, and Lord willing, I'll have 25 more." (At that moment, I felt a special kinship to that defense attorney.) I do not know how that hearing turned out — the Court took it under advisement – but the lesson to me was clear. If you want to talk to a witness and the witness will not cooperate, move for a deposition pursuant to RCr 7.10, or seek an evidentiary hearing to which you can subpoena the witness, or find another lawful way to interview the witness.

Finally, make sure that the "proceeding" to which you are subpoenaing witnesses is, in fact, a lawful proceeding and not just a ruse to get the testimony. In *Bishop v. Caudill,* Ky., 87 S.W.3d 1 (2002), a prosecutor subpoenaed some reluctant witnesses to a grand jury proceeding ostensibly for the purposes of investigating a new charge of alleged witness intimidation. The defense believed that the actual purpose for the subpoenas were to force witnesses friendly to the defense to testify under oath, prior to trial, so that the Commonwealth would be better prepared at trial. The Kentucky Supreme Court did not question the grand jury's authority to investigate whether witness intimidation had occurred; however, after noting that the subpoenas were issued under an already existing murder indictment, the Court held that a grand jury could not conduct such an investigation within the context of an already existing indictment. "There is no authority permitting a grand jury to recall or quash a rendered indictment on the basis of newly discovered… evidence, or to add new charges or additional parties." The court concluded that "if the purpose of subpoenaing [the witnesses] is to use the grand jury proceedings as a guise for trial preparation, the subpoenas must be quashed."

Myth No. 2: I can subpoena documents directly to my office.

No. Technically, there is no such thing as subpoenaing documents. RCr 7.02(3) states that you may command "the *person* to whom it is directed to produce the books, papers, documents or other objects designated therein." Even though it is the documents you desire, and you could care less about whether the person shows up or not, it is the person under the order of the subpoena, not the documents. (Hence the phrase *subpoena duces tecum*, which essentially translates into "bring the documents with you.") Since it is impermissible to subpoena a person to your office for any purpose (again, other than for a court-ordered deposition), it follows that you cannot command a person to come to your office bringing documents.

In *Geary v. Schroering,* Ky. App., 979 S.W.2d 134 (1998), the Court of Appeals cited *Munroe*, *supra,* for the general proposition that it was "improper to use an ex parte subpoena to obtain information… The requirement of a deposition or hearing invokes the necessary notice to opposing counsel and the right to be present to protect his or her interests." Obviously, if records are delivered secretly to one's office, that right is thwarted.

KBA Ethics Opinion E-423 also speaks to this issue:

> May a lawyer issue a subpoena to a person or entity accompanied by a letter (or by other means) inviting that person or entity to "certify" requested documents and provide them directly to the requesting lawyer, in lieu of attending a pretrial hearing or trial, without notice to opposing counsel, or a grand jury proceeding where such notice is not required?

In answering "no," the KBA stated that "lawyers are not at liberty to alter the terms of a subpoena, once issued, by inviting a witness to comply through document production in lieu of attendance." And, relying upon RCr 7.02, "subpoenaed documents may be produced only before the Court in connection with a judicial proceeding or properly authorized deposition." Worse, a failure to give notice to all parties of document production pursuant to a *subpoena duces tecum* "engages in deceitful conduct in violation of [Rules of Professional Conduct] 8.3(c), and obstructs another party's access to evidence in violation of RPC 3.4(a)."

Bishop v. Caudill is also referenced in KBA Ethics Opinion E-423 in connection with the subpoenaing of both witnesses and documents to a grand jury. However, in fairness to the Commonwealth, it should be mentioned that the Board of Governors of the Kentucky Bar Association has been requested by at least one Commonwealth's Attorney to reconsider the portions of its opinion that concern the production of records or witnesses to grand juries. Jefferson County Commonwealth Attorney, R. David Stengel, in a letter dated January 14, 2003, requested that grand juries are urged to be exempted on the grounds that grand jury investigations are "not an adversarial process: defendants do not have the right to appear before the grand jury or to examine witnesses," and the cost of having custodians appear without simply mailing in the documents would created considerable and unnecessary expense. Whether the opinion will be revised to reflect these realities remains to be seen. However, for the practicing defense lawyer, there is no question, and no exception, to the rule that you cannot subpoena witnesses or documents to your office.

This entire ethics opinion is "must reading" material. Failure to comply with the rules not only subjects you to possible bar sanctions, but it may also result in your not getting to use the evidence at trial. The only safe way to subpoena documents is to direct the custodian of records to deliver the documents to the courthouse at a hearing, or into the court file.

Myth No. 3: If I subpoena documents to the Courthouse, but the witness drops them off at my office by mistake, or out of convenience, I can go ahead and look at them and then decide if I want to go ahead and file them, or just throw them away.

Of course not, although I have known attorneys who think that you can, based upon the rules of reciprocal discovery. The belief is, since you only have to produce to the Commonwealth what you intend to produce at trial, if you do choose not to use it at trial, you can dispose of it. Unfortunately, that is not the rule when you invoke the power of the Court to get documents. The subpoena is a *court order,* and documents procured thereby are not attorney work product, or subject to attorney discretion. Do not follow this practice.

If by chance or by courtesy the custodian delivers subpoenaed documents to your office, you should follow one of two paths, depending upon the circumstance, neither of which allows you to simply throw them away. Regardless of method of acquisition of subpoenaed documents, they must be produced to the other side.

Prior Court Approval: If the documents are being produced after a hearing (with notice to the other party) has already been held and a court order has been issued allowing you to have them and look at them without further court review, you can open the file and look at the documents. Just make sure that the documents you have been sent are the ones the Order entitles you to review. After review, you must file the contents in the court file. As to medical records, this is plainly stated in KRS 422.305 and 422.320. As to other records, RCr 7.02 authorizes the court to direct that books, papers, documents or objects be produced *before the court.* If the subpoenaed items are not placed in the court file, then they are not "before the court." Moreover, as it is information produced pursuant to a court order, and available to all parties and the court pursuant to RCr 7.02(3), throwing them away risks a destruction of evidence charge. The rule provides that the court is authorized to allow the subpoenaed objects or documents to be inspected "by the parties [plural] and their attorneys [plural]."

If it is critical that you examine your client's medical records, social security records or other documents relating to him, without incurring the obligation of having to turn them over, use a release. Then you only have to turn over those documents you intend to introduce at trial, or which you show to an expert you expect to call live at trial, and that is only if there is an obligation of reciprocal discovery.

No Prior Court Approval. Why are you subpoenaing documents without prior court approval? At the least, you must give notice to the other party, and if the subpoenas are for records of a non-party, to the non-party also. But assuming the subpoenas have gone out, and the documents have arrived, what do you do now? If there has not been a hearing concerning the discoverability of the documents, and the Court has not otherwise ordered that you are entitled to see them, then you should not look at the documents, but should place the still sealed envelope into the court file and schedule a hearing, asserting your right to look at the documents. If you look at the contents, or publish them to someone else, only to find out later that the documents were privileged and should have been revealed to you, if at all, only after an on-camera inspection, you could open yourself up to sanctions for abuse of process and place at risk your ability to use the documents in trial.

KRS 422.305 and .315 specifically govern subpoenas of medical records, and KRS 422.330 specifically provides that the psychiatrist-patient privilege is to remain intact. Hence, subpoenaing a person's mental health records and looking at

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them without prior court permission can subject the attorney to contempt of court or a finding of misconduct.

In *Geary, supra,* the court relied upon *Humana, Inc. v. Fairchild,* Ky. App., 603 S.W.2d 918 (1980) and recognized that there must be restrictions in discovery proceedings to protect individuals from an invasion of private information which is also irrelevant to the claim. "These restrictions and protections cannot be obtained unless discovery is adversarial with notice and right to be present."

In *Smith v. Commonwealth,* Ky., 788 S.W.2d 266 (1990), the Kentucky Supreme Court affirmed the trial court's refusal to allow into evidence the medical records of a witness. The defense attorney had wanted to enter the records into evidence in order to show that the witness was mentally unstable, and therefore not credible. The trial court excluded them on the ground that the medical records were irrelevant. The Supreme Court agreed with the appellant that the medical records were indeed relevant, but nevertheless upheld the exclusion, *because KRS 422.305 required the defense attorney to give notice to the prosecution before obtaining the record, and no such notice had been given!* Ouch!

Other statutes preserve confidentiality or privacy interest, even while allowing the confidential or private records to be subpoenaed. One example of the risks associated with using such subpoenaed documents prior to court authorization occurred recently in the defense of a "doctor shopping" case tried by a colleague of mine. "Doctor shopping" refers to an alleged illegal attempt to obtain a prescription for a controlled substance by knowingly misrepresenting to, or withholding information from, a practitioner licensed to dispense drugs, in violation of KRS 218A.140. The "doctor shopper" theoretically goes from doctor to doctor to doctor attempting to get multiple prescriptions for the same drug in a short period of time.

To combat this practice, the Cabinet of Human Resources maintains an electronic system for monitoring controlled substances, whereby each practitioner who prescribes or dispenses drugs provides data including the name and address of the person to whom each prescription was given. The Cabinet is authorized to provide this data to any state, federal or municipal officer whose duty is to enforce the drug enforcement laws of Kentucky or the United States, and who is engaged in a bona fide specific investigation involving a designated person. KRS 218A.202. The drug enforcement officer can then use the data obtained to obtain a warrant, effect an arrest, procure an indictment, or perform any other legitimate police task.

In my colleague's case, the authorities used a subpoena to obtain the compilations of data from the Cabinet's database. However, upon obtaining the data, the authorities rushed into the grand jury room, presented the results of the data, and procured indictments for doctor shopping against his client. This was a misuse of the materials and an abuse of the statute, which provides in pertinent part: "A person who receives data or any report of the system from the cabinet shall not provide it to any other person or entity except by order of a court of competent jurisdiction." Because the government had not sought a court order prior to publishing the information to a grand jury the data was suppressed as illegally obtained evidence.

The moral is, just because you got something by a subpoena, it does not mean you can use it anyway you want; other rules of privilege or confidentiality may limit the usage.

Myth No. 4: I can subpoena children to court by serving EITHER parent with a subpoena.

Not exactly. RCr 7.02(2) provides in part that "[a] subpoena for an unmarried infant shall be served upon the infant's resident guardian if there is one known to the party requesting it, or, if none, by serving either the infant's father or mother within this state or, if none, by serving the person within this state having control of the infant…" On those occasions where the parents are divorced and custody is granted to one parent, the defense lawyer must serve the subpoena on the *custodial* parent, not the non-custodial parent.

The rule specifies that either parent can be subpoenaed *only* where there is no known "resident guardian." If you serve your own client with the subpoena, and he does not have custody of the children, you will not prevail when the children do not show up and you have to prove to the court proper service of the subpoena in order to get a continuance or other remedy. Certainly, the non-custodial parent qualifies as the "resident guardian" when the child is visiting pursuant to the decree of custody; but when the child is not visiting the resident guardian will be the custodial parent. To avoid any doubt, subpoena both parents.

Myth No. 5: I actually have to place the subpoena in the witness's hand before he is bound by it.

Stories abound, many of them apocryphal, about hiding subpoenas in pizza boxes or wrapping them up in gift boxes because of the mistaken belief that you have to physically place the subpoena in someone's hand before you can claim it has been delivered. Actually, all that is required is that an attempt to deliver be made. RCr 7.02(4) provides that "service of the subpoena shall be made by delivering *or offering* to deliver a copy thereof to the person to whom it is directed."

Yelling to a person that you have a subpoena for them as they are bolting down an alley satisfies the "offering to deliver" requirement. Likewise, while there is no case law to support it, an offer to deliver a subpoena made over the telephone meets the requirement. If the offer is accepted,

actual delivery of the subpoena should be attempted. But if the offer is declined, RCr 7.02 ought to be satisfied.

Myth No. 6: I have to file a copy of the subpoena before it is binding on the witness.

Until I started writing this article, I thought that was the rule. All the prosecutors with whom I have litigated file subpoenas for officers and witnesses in the courthouse as a rule. If a witness does not show for court, the judges first check the file to see if a copy of the subpoena is there before issuing a warrant for the witness or resetting the case. Notwithstanding all of this local practice, there is no authority anywhere that says the subpoena has to be filed to be binding. All that RCr 7.02(4) requires for proof of service is an affidavit endorsed upon the subpoena by the person serving the subpoena. While interests of judicial expediency would be accommodated if the copy of the subpoena were already in the file, the rule seems to allow counsel to produce proof of service from his or her own file at the time of trial, when a witness does not show.

Most of the time, especially when the witnesses are already known to the Commonwealth, counsel would want to file the subpoenas to avoid losing them, or having to make an argument why they do not have to be filed. However, sometimes there are situations in which in which the defense would disclose a critical element of its case by giving notice to the Commonwealth of a witness the Commonwealth does not know about,. Under the United States and Kentucky Constitutions as well as KRS 500.070 (2), the Commonwealth's burden of proof protects the defense from the requirement of providing notice of a defense. In that instance, it might be best to not file the subpoena, and take your chances that if the witness is a no-show, the judge will not force you to trial for failure to file the proof of service.

Myth No. 7: I can only subpoena a witness who lives in the same county where the trial will be.

While distance from the courthouse will certainly be relevant when a judge is deciding whether a witness's attendance to trial is unduly oppressive or unreasonable, RCr 7.02(5) allows service on a witness "anywhere in the Commonwealth." Thus, a Fulton County witness can be hailed into a Boyd County Courthouse. This myth that the witness has to live in the county probably arises from Civil Rule 45.04, which states that for a deposition, a resident of the state "may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court." CR 45.05, which applies to civil trials, allows a witness to be served anywhere in the state. However, his attendance at trial will not be compelled "unless he failed, when duly subpoenaed, to give his deposition." Hence, the practice has been generally to take depositions of witnesses who live far away, but subpoena live for trial those witnesses who live close to the courthouse.

Myth No. 8: If I have properly filled out a subpoena, and the witness hasn't challenged the subpoena but still doesn't show up, the Court will automatically send the Sheriff after them or give me a continuance.

No. RCr 7.02(3) does permit a custodian of records or other witness having documents to ask the court to quash a subpoena duces tecum if compliance would be "oppressive" or "unreasonable." However, a witness's failure to ask the court to quash the subpoena prior to the time of the proceeding does not relieve the subpoenaing attorney from the obligation of proving to the court that the witness or documents requested are "necessary," that is, "relevant, material and useful" (*See U.S. v. Moore*, 917 F.2d 215 (6th Cir. 1990), *cert. denied*, 499 U.S. 963, 111 S.Ct. 1590, 113 L.Ed.2d 654).

A showing that a witness is necessary is required because otherwise attorneys could manipulate the system by subpoenaing someone known to the attorney to be never available for trial, thereby continuing a case indefinitely. An extreme but true illustration of this occurred in the early 1980's, and was reported by a small newspaper in Eastern Kentucky when a lawyer attempted to have President Reagan and Vice-president Bush subpoenaed into district court in a small Kentucky town, allegedly to give relevant testimony in an alleged child abuse case. The subpoenas were quashed.

So even where a witness makes no attempt to seek judicial permission not to attend, counsel should be prepared to prove to the court's satisfaction that the subpoenaed witness had testimony that was relevant, material and useful to the defense.

Myth No. 9: If my subpoenaed witness shows up, but I decide I don't want to call him, I can just send him home.

Absolutely not. Although the issuing official is the Circuit Court Clerk (and therefore it is the Clerk's, rather than a judge's order), the subpoena is an order of the court. Once served, it can only be released upon order of the Court. The trial court retains the authority to release the witness from the command of the subpoena. Prosecutors and defense counsel alike must ask the trial court to release a witness under subpoena before telling the witness they are excused, else risking contempt of court, finding of misconduct, or worse.

This issue arose a couple of years ago during argument on the case of *Anderson v. Commonwealth*, Ky., 63 S.W.3d 135 (2001). Justices Cooper and Johnstone questioned the Commonwealth's appellate lawyer about a situation where the prosecutor had released a subpoenaed witness after the first day of trial, although the Commonwealth had included the person on the list of potential witnesses it had given to the Court earlier that day. When the defense tried to call the witness, he was unavailable.

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"What authority does a lawyer have to tell any witness in any trial, who's been subpoenaed, that you don't have to come to court?" the Supreme Court wanted to know.

The answer was given in the opinion: "We believe that once subpoenaed, the witness is answerable to the court and can only be excused by the court. In affirming a contempt order against an absent subpoenaed witness in *Otis v. Meade, Ky., 483 S.W.2d 161 (1972)*, we held that 1the subpoena created a continuing obligation on his part to be available as a witness until the case was concluded or *until he was dismissed by the court.*' [Emphasis added by the Court.] Any other view taken would require the issuance of multiple subpoenas to a witness whose testimony is deemed material by more than one party."

Myth No. 10: If the subpoenaed witness doesn't show up, the judge won't find the witness in contempt, so long as both sides agree there is no need for the witness.

No. Go back to the discussion of Myth No. 9. Only the trial judge can release a witness. Under RCr 7.02(7), if a subpoenaed witness does not show up and does not present an adequate excuse, the judge can punish the witness as being in contempt of court. I personally have seen judges order the Sheriff to hunt down absent witnesses, including even alleged *victims*, and escort them to the county jail to await a contempt of court show-cause proceeding. KRS 421.110 allows a court to punish a witness who intentionally disobeys a subpoena or intentionally evades service with contempt of court.

Otis v. Meade, Ky., 483 S.W.2d 161 (1972), mentioned in the *Anderson* case, *supra*, is illustrative of the contempt power for failure of a witness to obey a subpoena. In that case, a witness was subpoenaed to trial on a Wednesday. He remained in court all day, but did not get to testify. At the end of the day, the judge called him to the bench, and told him to return on Friday. The witness failed to appear on Friday, and the case went to verdict without the benefit of his testimony. Later, the witness was brought before the judge to show cause why he should not be held in contempt of court. After acknowledging that he had been told to return on Friday, but claiming that he had not done so because of fear for his life and his family's lives, the Judge found contempt and sentenced him to six months in jail and a $500 fine. Not surprisingly, Kentucky's highest court upheld the sanction, finding that "the subpoena created a continuing obligation on his part to be available as a witness until the case was concluded or until he was dismissed by the court."

What *may* be surprising is that the Court went on to hold not only that the trial judge was acting within his authority to find contempt, but that under the circumstances, the judge was not even required to conduct a hearing before he found the witness in contempt. Because the witness admitted on the record that he had been told to come back, there was no fact issue to resolve by a hearing. Moreover, because the incarceration imposed was only six months, and the fine only $500, the sentence was not "serious enough" to require the impaneling of a jury

In short, do not rely upon any agreement with the Commonwealth which intrudes upon the power of the Court, especially when it involves the non-appearance at trial of a material witness. Let the Court do the work, and release the witnesses.

Why myths have you been guilty of following? (Don't answer that!) I'll bet at least one or two. There is absolutely no substitute for knowing the rules regarding their use, and there is little tolerance by the courts for abuse of the subpoena process. If you have a question about whether your use of a subpoena is improper, ask someone. Find out. Myth-use of a subpoena is misuse of a Court Order; when couched in those terms, it cannot be too much underscored how dangerous such myth-use can be.

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Thanks goes to Bette Niemi, Capital Trial Branch Manager of DPA, and Peyton Reynolds and Barbara Carnes, of Hazard DPA Office, who contributed to this article whether they know it or not. Through the instruction of these veterans, I have been able to correct or avoid my own myth-use of subpoenas. They are the inspiration for this article. ■

...we are entitled to make almost any reasonable assumption, but should resist making conclusions until evidence requires that we do so.

— Steve Allen

PUBLIC ADVOCACY SEEKS NOMINATIONS

We seek nominations for the Office of Public Advocacy Awards which will be presented at this year's 32nd Annual Conference in June. An Awards Search Committee recommends two recipients to the Public Advocate for each of the following awards. The Public Advocate then makes the selection. Contact Lisa Blevins at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006 ext. 294; Fax: (502) 564-7890; or Email: Lisa.Blevins@ky.gov for a nomination form. **All nominations are to be submitted on this form by April 5, 2004.**

Gideon Award: Trumpeting Counsel for Kentucky's Poor

In celebration of the 30th Anniversary of the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the *Gideon* Award was established in 1993. It is presented at the Annual Conference to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky. Clarence Earl Gideon was denied counsel and was convicted. After his hand-written petition to the U.S. Supreme Court, he was acquitted upon retrial where he was represented by counsel.

Rosa Parks Award: For Advocacy for the Poor

Established in 1995, the *Rosa Parks* Award is presented at the Annual DPA Public Defender Conference to the non-attorney who has galvanized other people into action through their dedication, service, sacrifice and commitment to the poor. After Rosa Parks was convicted of violating the Alabama bus segregation law, Martin Luther King said, "I want it to be known that we're going to work with grim and bold determination to gain justice... And we are not wrong.... If we are wrong justice is a lie. And we are determined...to work and fight until justice runs down like water and righteousness like a mighty stream."

Nelson Mandela Lifetime Achievement Award

Established in 1997 to honor an attorney for a lifetime of dedicated services and outstanding achievements in providing, supporting, and leading in a systematic way the increase in the right to counsel for Kentucky indigent criminal defendants. Nelson Mandela was the recipient of the 1993 Nobel Peace Prize, President of the African National Congress and head of the Anti-Apartheid movement. His life is an epic of struggle, setback, renewal hope and triumph with a quarter century of it behind bars. His autobiography ended, "I have walked the long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb... I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended."

In Re Gault Award: For Juvenile Advocacy

This Award honors the person who has advanced the quality of representation for juvenile defenders in Kentucky. It was established in 2000 by Public Advocate, Ernie Lewis and carries the name of the 1967 U.S. Supreme Court case that held a juvenile has the right to notice of changes, counsel, confrontation and cross-examination of witnesses and to the privilege against self-incrimination.

Professionalism & Excellence Award

The Professionalism & Excellence Award began in 1999. The President-Elect of the KBA selects the recipient from nominations. The criteria is the person who best emulates Professionalism & Excellence as defined by the 1998 Public Advocate's Workgroup on Professionalism & Excellence: prepared and knowledgeable, respectful and trustworthy, supportive and collaborative. The person celebrates individual talents and skills, and works to insure; high quality representation of clients or service to customers, and takes responsibility for their sphere of influence and exhibits the essential characteristics of professional excellence.

Anthony Lewis Media Award

Established in 1999, this Award recognizes in the name of the *New York Times* Pulitzer Prize columnist and author of *Gideon's Trumpet* (1964), the media's informing or editorializing on the crucial role public defenders play in providing counsel to insure there is fair process which provides reliable results that the public can have confidence in. **Anthony Lewis**, himself, has selected two recipients to receive the Award named in his honor in its first year, 1999.

FETAL ALCOHOL SYNDROME: AN EFFECTIVE CAPITAL DEFENSE

*From an article written by Denise Ferry originally published in **California Attorneys for Criminal Justice Forum**, 1997, Volume 24, Number 2; pp 42-50. Reprinted with permission of California Attorneys for Criminal Justice. This is the 2nd in a series. The first, **Fetal Alcohol Spectrum Disorder**, by Laura Nagle, appeared in **The Advocate**, 2003, Vol. 25 No. 6.*

Establishing the existence of Fetal Alcohol Syndrome (FAS) in a defendant in a capital case can be a long and difficult process. No one characteristic is definitive for a diagnosis, few physicians are trained in the diagnosis of FAS, and no laboratory test exists to confirm the clinical diagnosis.

If, however, your defendant has Fetal Alcohol Syndrome, it is of overwhelming significance to his defense. FAS is a birth defect which has seriously and permanently disorganized the defendant's developing brain and impaired his intellectual and mental function. It impacts all aspects of the capital case process, including competency to stand trial, to assist counsel, to enter valid waivers, the validity of prior convictions, the ability to premeditate and deliberate, and his life-long mental status at the time of the offense. It may be the core of mitigation at penalty phase, as this organic brain damage is also the root cause of so much of the trauma he has suffered throughout his life.

The following article will attempt to assist you in recognizing the red flags suggestive of FAS, how and where to gather the additional information which further substantiates the existence of the syndrome, and a discussion about how the manifestations of FAS contributed to the predicament in which your defendant now finds himself.

Typical Initial Clues of FAS in Defendants

The possibility of FAS may first call itself to your attention when you read the facts of the case. There may be a guileless and loquacious confession to a crime that speaks of a tragic blunder replete with odd, spontaneous and impotent behavior on the part of the defendant. Prior evaluations may or may not indicate low IQ or an abnormal EEG. There may be observations on the part of various institutional staff that the defendant had no insight, exhibited poor judgement, seemed unable to understand the consequences of his behavior and never progressed toward any mutually agreed upon goals. He may have been hyperactive as a child and taken Ritalin. He may have been small and remained so. The family remembers he was slow to crawl, walk and learn to ride a bike, and he was always clumsy. When he reached school, he had poor concentration and was a memorable behavior problem in class. In fact, although very friendly, he never seemed to learn to behave "properly." Perhaps he left school early and began to run away. It may turn out he was adopted, or that his mother was a heavy drinker and died. Although you can't put your finger on it, there is a growing sense as you confer with him that something is wrong.

Attendant Problems for the Child with FAS

Since individuals with FAS have difficulty understanding cause and effect, they often do not comprehend or remember verbal instruction and warnings. Repeating behavior they were warned against is seen as stubborn defiance and the child is punished with escalating severity. Unable to pick up social cues, he doesn't hear the enraged voices, see the angry face, nor realize the adult bearing down upon him is bent on "teaching him a lesson he'll never forget." Unable to remember he's already been punished for doing "this," he functions in a state of perpetual innocence. He often becomes the scapegoat in the family.

Although a happy, innocent, cooperative disposition is typical of children with FAS, many respond to frustrations as they get older with temper tantrums and destructive behavior. Those that have been abused can become aggressive, quick to anger when crossed, and, unable to control their anger, strike out impulsively. They can also develop severe mental health problems as their spirits are injured by abuse and neglect, as are the spirits of unimpaired children. Even children with FAS raised in stable and loving adoptive homes seem to develop emotional problems as they grow older and realize the gap between expectations of them and their abilities.

If they have been recognized as having emotional problems, treatment may not have been effective. Treatments necessitating insight into one's behavior and the ability to take corrective action may have been difficult for them. Inappropriate or contraindicated medications may also have been prescribed which could either mask or exacerbate the individual's problems and lead all involved through a discouraging round of hopes and disappointment.

As they grow into adulthood, those who appear to be the least impaired once again appear to be most at risk. Unqualified for sheltered living, they are often unable to function independently in the world. Attention and memory problems as well as trouble with higher order thought processes can interfere with their ability to maintain the day-to-day consistency to fulfill even the most modest expectations of a regular employer. The intricacies of an independent residence are often beyond them. Many leave their family home only to end up in homeless shelters, with acquaintances or on the streets. Handicapped by naivete, bad judgement and the inability to learn by their mistakes, they fall in with bad company and are victimized in many ways. Their excessive curiosity and need for physical contact make them vulnerable to sexual exploitation. Some are also exploited for low level criminal purposes by the more so-

phisticated in return for shelter and the illusion of friendship. Many become addicted to alcohol or drugs, depressed, suicidal and/or psychotic as the frustration and despair mounts up.

They have learned to read, but not to think. Anxious to please, they have nodded meaningless assent to chronicles of their failures and plans for future self-improvement. Unable to understand accepted social interaction and left to make their way as best they can with no skills for legitimate employment, they are headed for trouble.

How to Investigate/Substantiate FAS

The appropriate method of substantiating FAS in your defendant is the one already in place for capital trials and capital habeas appeals: the investigation of mental health and penalty phase issues.

All the defendant's school, medical, dental, military, employment, social service, criminal records, etc. (every document with his name on it) and as far as possible, the same for his biological, foster or adoptive families, must be acquired and interwoven into a life history chronology. When FAS is suspected, there is special emphasis on biological family records, especially the biological mother and her other children.

Interviews with the usual array of family members, friends, teachers, case workers, etc. are conducted to construct a picture of the defendant's life. When FAS is being investigated, however, the questions in certain areas will be more refined and persistent. In order to corroborate his impairment as organic rather than behavioral, it is important to acquire anecdotal evidence of his inability from his earliest years to learn, to understand the consequences of his actions or curb his impulsive behavior. A kindly grade school teacher, for instance, might have given him that passing grade just because he tried so hard (but failed) to learn the first assignment: to write his name.

The mother's history of alcohol consumption must be taken from every possible source, starting with her own reporting. The information needs to be as precise as possible: how much alcohol did she consume, how often, what type, over what length of time, etc. Was she a binge drinker (five or more drinks in one sitting); a moderate but regular drinker; what constitutes "moderate drinking" for each person? Everyone's memory must be searched for her drinking patterns during the time when she was pregnant with your defendant. All of her healthcare workers need to be sought out and interviewed on this subject.

Did people observe typical alcoholic behavior during their interaction with her? Did she make appointments she did not keep; lose jobs because she didn't show up for work? Did she get DUIs, have blackouts, fall down, become hospitalized? Persistent questions might even reveal that she showed up sometimes with alcohol on her breath.

In every capital case, photos are needed of the defendant when he was young and innocent. In the case of suspected FAS, though, those early photos are a critical diagnostic tool. Often a defendant whose face looks normal to you now, displayed as a child the facial features common to children with Fetal Alcohol Syndrome. Often these signs are very subtle and can only be perceived by the trained eye. Photos that show the face most clearly and date from the preschool period are the most useful, especially if the child in the photograph is not smiling. Often families are too financially pressed to have taken photos or to have held on to them. Aunts, uncles, grandparents and friends may have taken their own pictures or have been given a copy of the small class photos. Schools may have old class photos.

As adoption and FAS are often found together, every effort must be made to get these records and locate the birth mother or substantiate the cause of death if she is deceased. It is possible that her death may have been caused by an alcohol-related disease or accident.

Follow her fate as far as possible because, even if she simply dropped out of sight, her trail up to her disappearance may indicate a life shattered by alcohol. Try to establish how many children she had (along with miscarriages, if any), if any children were put up for adoption or removed from her care and whether or not their fate is indicative of FAS impairment.

Some Typical Problems in Investigating FAS

Many women had not regarded themselves alcoholics until they gave birth to a child with FAS. Even then, unable to get or respond to treatment, they had continued to give birth to children with FAS. When trying to substantiate their alcohol history, you may run into complete denial or at least attempts to minimize the drinking involved. Even if the mother has come to terms with her drinking, there will be enormous shame and guilt over the damage she has caused her child, and her role in the predicament in which the defendant now finds himself. It is important to stress to her that alcohol use was not understood, even by medical and research experts, to be damaging to unborn children until 1973. The Surgeon General's warning about not drinking alcohol while pregnant was only made in 1981. Some doctors are still prescribing a drink before dinner to help pregnant women relax. It is important that this topic is not discussed in a judgmental way that might alienate the mother or her protective family and friends.

You may also find yourself dealing with a mother who is herself impaired by prenatal exposure to alcohol. Although FAS is not genetically transmitted, it can occur in generations of a family because women with FAS are more at risk to develop heavy drinking patterns themselves. You will need to be mindful of the implications of her own impairment in your interactions with her.

Don't assume that the amount of alcohol consumption you are hearing about was too small to be damaging to the defendant. Women and their developing fetuses respond individually to alcohol intake. Those with slow rates of alcohol metabolism may give birth to children with more significant dam-

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age than those with faster metabolism. For unknown reasons, fetuses also respond differently. For example, dizygotic twins may exhibit different damage.

Also consider that the mother may have been involved with many toxic substances from glue sniffing to illegal drugs and may not consider alcohol her "drug of choice" or primary treatment issue. Her medical records may reflect drug use, but not the alcohol that is often also present.

Very often, because the birth mother has died or disappeared, there are multiple foster homes, and eventually, an adoption. In one study, about one-third of biological mothers gave up custody of their children with FAS at birth, and another one-third gave up custody the time the child reached age six. Whether or not the children stay with their mothers or go into foster homes, their family environments are unusually unstable. The very environment they most need – calm, structured, consistent – is the one that seems to elude them. Difficult to cope with, children with FAS can sometimes become too much for the foster family, and thus end up in places which are chaotic, disorganized and abusive. Regardless of the quality of his care, your defendant will probably be remembered by these foster families as the kid who "just didn't get it."

Among cross-cultural foster or adoptive families, subtle racism or cross-cultural misperceptions can color their view (and memory) of the behavior of a child with FAS. Particularly in the past, a child's failure to do well in school, to follow social norms, his tendency to isolate, have no goals nor desire to "better himself" but just live day to day could dovetail perfectly with negative racial stereotypes of minorities prevalent among white society in general, and institutions such as the school system. The real basis of his failure to succeed (FAS) could have been obscured.

The defendant's birth records are often not of as much help as they should be. FAS was usually not detected, especially at birth, because its diagnostic features were overlooked or not known to be of significance and the alcoholic mother may not have been identified as such unless her condition was extreme. In his early years, the child may have appeared alert and verbal: "he was such a bright child, I don't know what happened." This kind of statement can innocently mislead the investigator to look for environmental traumas as the basis of his problems. Children less obviously affected by FAS can also exhibit the kind of impairments and behavior that could have resulted in misdiagnosis, such as antisocial personality disorder, attention deficit disorders, speech and language handicaps and learning disabilities, particularly since FAS was unknown until 1973.

The biological, foster or adoptive families of children with FAS may have compensated early on for the child's small size and developmental failures by adjusting their expectations of him. In retrospect, it may be difficult for them to remember that though he did okay for someone of his size, he was not doing well for someone of his age. Diminutive nicknames such as "baby" or "runt" may be a better indicator of how he was really viewed.

As part of his defense team, you may have difficulty believing you have a defendant with FAS. His physical appearance may belie the stereotype. He may not have been born very small with low birth weight. Or, he may be overweight and his face shows none of the characteristics of FAS. He may be very verbal and "seem to have a handle on things." With time, though, it will become apparent that he is re-offering impossible defense strategies as if for the first time, changing his story in often absurd ways and that clearly he cannot think well.

Impact on Defense Preparation

People with FAS have serious cognitive loss in areas indicative of organic damage: impairment of memory, comprehension, calculation and judgment. This loss bears on every aspect of the defense from his competency to stand trial to his competency to be executed.

Competency to Stand Trial

Close questioning or observation of the defendant may reveal either (1) he is incapable of understanding the nature and purpose of the proceedings against him; (2) he does not comprehend his own status and condition in reference to such proceedings; or (3) he is unable to assist his attorney in conducting his defense, or to conduct his own defense in a rational manner. His life-long inability to maintain focused attention or relate an experience in a detailed and rational sequence renders the information he gives his defense team unreliable (and at times even preposterous). These same difficulties with maintaining attention preclude him from following the court proceedings (although he may attempt to appear to do so). When the strong determination that can lead him to be stubborn, inflexible and resistant (particularly in situations he perceives as unfair or unjust) is coupled with his inability to control his behavior, he may become unpredictable in court, particularly if his peculiar defense strategies are not being followed.

FAS impairments can be used to challenge the defendant's consent to a search and his waiver of *Miranda* rights which, in all likelihood, he did not understand, although he assured officers he did in an effort to appear normal.

Voluntariness of a confession and its reliability can be challenged because, once again, the defendant's failure to comprehend the situation he was in when questioned, his desire to prove he knew what was going on at the time of the offense, and a desire to ingratiate himself to the officers are his undoing. His loquacious confession, when examined closely, will often be filled with confabulations to cover up gaps in both his perceptions and his memory and to offer explanations that will make his actions at the time of the crime seem rational. He is particularly vulnerable to adopting "helpful" suggestions by police officers, jailhouse psychologists and jailhouse informants to explain his motives and actions. He may readily agree to a version of events which paints him as in charge and "bad."

FAS can be offered in mitigation of prior offenses and convictions. Consider the possibility that he may even have pleaded guilty to crimes he either did not commit or in which he was merely an uncomprehending bystander or accomplice.

A plea of NGI may be appropriate due to his ongoing "mental non-responsibility" as a result of the cognitive impairment which rendered him incapable of understanding the nature and quality of his act and of distinguishing right from wrong with the resulting consequence at the time of the offense.

In a felony-murder prosecution, FAS can be used to show that the defendant lacked the specific intent for both the underlying felonies and the murder itself. For instance, because a defendant with FAS may lack the ability to formulate and carry out plans, property from the crime scene found with him at the time of arrest may have been simply picked up there in a haphazard, spontaneous manner. Or a robbery may have been committed at the behest of others and the proceeds turned over to them with neither the understanding that his activity was wrong nor the personal goal to acquire the good. The defendant with FAS may have complied with their request only to win favor with and retain the only friends he had.

In non-felony murder cases, FAS may show he lacked the mental-state elements necessary for premeditation, deliberation and malice aforethought. Given what is known about individuals with FAS, it is unlikely that he would have intended to kill anyone or arrived at that decision as a result of "careful thoughts and weighing of considerations for and against the proposed course of action…and not under a sudden heat of passion or other condition precluding the idea of deliberation." (CALJIC No. 8.20) It is the "other condition" which is the guiding force here. The "condition" is FAS, and the nature of its lifelong organic impairments preclude deliberation. Its multiple impairments have, from birth, made it difficult for him to appreciate consequences, understand cause and effect, mediate impulse-driven behavior and conform his behavior to the law's requirement.

If the defendant was under the influence of alcohol (or drugs) at the time of the offense, the dis-inhibiting effects of the alcohol or drug could have further reduced his already FAS impaired impulse control, making him more vulnerable to committing the impulsive, spontaneous act of violence which resulted in the victim's death.

If there are codefendants, it is possible that they are pointing the finger at your defendant as the ringleader and, flattered by this "respect", he is only too happy to claim this sudden elevation in status. In felony-murder cases, it may be that the defendant with FAS had not even known that the felony was to occur or did not share the perpetrators' criminal intent concerning the felony (in which case he would not be guilty of first-degree felony murder or the underlying felony). In non-felony murders he may also have a defense based upon the lack of proof of aiding and abetting his codefendants in the killing with the necessary intent. Individuals with FAS are easily led and their need for acceptance is so great they can easily become involved with other people in a crime that they would not commit or even think of on their own. Even if he is the only defendant arrested and charged, it is also possible others were involved and, more alert to an impending arrest and faster on their feet, they made their escape. A primitive code of honor (supplemented by dire threats) which has been drummed into your defendant may now be preventing him from informing you of these others.

Penalty Phase

If trial has progressed to penalty phase, FAS may become the core of mitigation. The defendant is not before the jury because he was greedy or filled with hate, but because he was born with organic brain damage and yet was expected to cope, as though he was normal, with an increasingly complex world he could never fully comprehend.

He was a victim, even before birth, of society's failure to help his mother cope with alcoholism. There were no residential treatment facilities for pregnant women when his mother was carrying him and traditional alcohol treatment programs probably did not want her because they were afraid of the liability of pregnancy complications. Obstetric services, if she was able to avail herself of them, may not have inquired about or ignored signs of her drinking, or may not have wanted to treat her because of her behavior. Those jurors who have children might be invited to consider whether or not they would have given their newborn infants a double scotch in its baby bottle. This is what the defendant's mother unknowingly gave him in the womb.

After he was born, his problems were never accurately diagnosed and he was probably subjected to the most detrimental possible environment for a child with FAS: chaotic, unstable and violent. He was often punished or persecuted for his FAS, which was at the root of so many of the problems he suffered in his life. His inability to comprehend the implications of his acts, understand cause and effect, learn from his mistakes and control his behavior meant that he could never have the extraordinary blameworthiness to justify the jury condemning him to death.

This failure to understand cause and effect and the implications of his actions should also help the jury understand the inability to express remorse (if that is the case) which erroneously makes him appear to be cold-blooded. One capital defendant with FAS went to a corner store to get a bottle of wine by pretending he had a gun in his jacket pocket. The clerk drew a real gun and in an ensuing struggle the defendant got ahold of the gun and, after telling the clerk to lie down on the floor, shot him. Taking the bottle across the street to the park, he asked some buddies hanging out there "what would happen if you shot a guy in the head" and whether any of them wanted to buy a gun. He then watched as an ambulance and police cars screeched to a halt in front of the corner store. When the police officers began approaching people in the park asking if they had seen anything suspicious, someone drew their attention to the defendant and his comments. The police yelled at

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him and he then began to run. He ran, not because he suddenly grasped that he had killed someone and they were after him; he ran because he was timid and their yelling frightened him. He could give no explanation for his actions. A normally gentle man, he had found himself in an escalating situation he was completely unable to cope with and to which he had simply reacted. He could not follow the links between his actions and the tragedy that ensues, and so could not exhibit the necessary remorse.

Since two-thirds of the population do not believe that people with mental retardation should be executed, that aspect of his multiple afflictions should be emphasized in penalty phase.

One potential problem to be alert for is the jurors' acquiring the view that because FAS cannot be changed, he is not going to get any better and should be executed. Defendants with FAS are very appropriate candidates for life without the possibility of parole. The things they are always in most need of – consistent, structured environments requiring few decisions that provide all that is necessary for basic subsistence – will alleviate much of the stress that made them so vulnerable to situations that were beyond their abilities to cope. His prior incarceration records are very likely to support this position, as would his former guards. In fact, the record may show that he consistently did best in prison, where he incurred only minor infractions, and only got into serious trouble when released on parole to once again fail the expectation that he "take charge of his life."

Post-conviction habeas review should focus on the petitioner's competency to have waived any of his rights. Ineffective assistance of counsel claims may need to be raised to failure to investigate and present FAS impairment at trial and failure to request a competency hearing at various stages in the proceedings when the behavior of the petitioner clearly indicated the need to do so.

Experts

Locating the appropriate FAS expert is critical. It is both a new and complex field, and at this stage, only a small group of people are competent to render a diagnosis. Psychologists, psychiatrists and experts in mental retardation are not trained in this area. FAS is not a DSM-IV diagnosis. Psychologists and psychiatrists, unaware of the true origins of the defendant's behavior, will understandably stray into such areas as antisocial personality disorder, attention deficit disorder, schizophrenia, etc. Experts in mental retardation will not recognize the additional debilitating features that are indicative of FAS and, focusing on the low IQ and low achievement, will fail to consider the origins of the disability.

Neuro-psychological testing is the traditional method for establishing the behavioral manifestations of brain damage. However, these tests were all developed on people with postnatally-acquired brain damage, rather than during the period of prenatal brain development. This standard neuro-psychological test battery may not be especially sensitive to the kinds of brain damage that people with FAS have. At the current state of knowledge, it isn't possible to diagnose FAS based solely on neuro-psychological testing.

The advantage to the defense in this situation is that when you have retained one of the very few people qualified in this field and they have given you a diagnosis of FAS, the prosecution will be at a disadvantage if they seek to challenge it. There is also less ambiguity and disagreement regarding FAS than among those diagnosing mental illness, for instance, in part because FAS encompasses identifiable physical defects. Any "expert" he puts up to challenge yours will not stand up to voir dire.

It is unlikely that your judge and jury has confronted FAS and will need a careful explanation of the differences between mental illness, mental retardation and FAS. If the defendant is less obviously impaired, the expert must be particularly careful to explain that whether someone is severely or mildly impaired by FAS, it is organic brain damage, and the disability has had a profound impact. In fact, individuals who are more mildly impaired have often had a worse time of it as their undetected, untreated, misunderstood condition has trapped them in other's impossible expectations.

It is helpful for the expert to emphasize all the physical abnormalities associated with FAS that are manifested in the defendant, as juries tend to be more sympathetic: they are traditionally less persuaded by psychological than by organic explanations for violent behavior. They seem to feel that if there is a physical problem that the person was born with, he is not as responsible.

Conclusion

Many defendants currently facing capital trials and appeals have Fetal Alcohol Syndrome, which has never been identified. This can be a legitimate and effective capital defense.

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THE PSYCHOLOGY OF LITIGATION: SUPPRESSION HEARINGS AND INVESTIGATOR BIAS

A police officer in a suppression hearing in a child sex abuse case testified that "the defendant appeared nervous," with his presumed nervousness at the outset having been preliminary to the investigator's interrogation of the defendant getting under way. By so testifying, he insinuated that the defendant's nervousness, in and of itself, was indicative of guilt. Since there is no electronic recording of the interrogation, the court must take the officer's word on the defendant's demeanor despite the fact that "appearing nervous" takes many forms, may range from mild to severe, and may signify many different things, including being in a state of innocence.

The officer's subsequent testimony was that since he believed the child's allegations of abuse as well as believed the defendant's demeanor signaled guilt, by his own admission he approached the defendant with a presumption of guilt. This same presumption of guilt, incidentally, was readily communicated to other witnesses this same officer interviewed, who complained of feeling intimidated by his overbearing manner when they did not support his insistence on the defendant's guilt.

An allegedly well-trained investigator whose credentials included years of seminars on how to conduct investigations of this nature, I was stunned to hear that he did not bother to clearly determine the defendant's meaning of terms used in reference to relevant human anatomy. It can be very important if "butt," for example, means buttocks to the defendant whereas it means anus to an investigator. The officer could not at first recall what words the defendant even used. He seemed unfazed when the terms he eventually came up with, that he ascribed as having come from the defendant's own mouth, turned out to be different from those actually used in his "summary" of the defendant's statement, despite this reportedly having been written contemporaneously, i.e., coinciding in real time with the defendant's utterances.

The officer appeared equally unperturbed when it became apparent that he had "blended" the statement of the child with that of the defendant such that he could not clearly recall the anatomical terminology used in either statement by either person, a point he conceded was probably the case. He asserted that he saw his job as that of putting people in jail, so at the very least there was no hypocritical pretense of fairness, impartiality, or neutrality on his part.

Neither a transcript of the child's actual statement nor an electronic recording of this statement was provided the defendant, nor, as already noted, was there an electronic recording of the defendant's statement. Whatever transpired in the interviews between investigator and alleged child victim and between investigator and defendant was communicated to the court by a law enforcement officer who seemed well pleased with his supposed ability to discern the truth, based on his interview with the child and his perception of the defendant's "nervousness," and thus single-handedly bring the guilty to justice.

What is wrong with this picture? Let us first consider the issue of the defendant's alleged nervousness, which, as any well trained investigator knows, signals guilt and hence the likelihood of deception. Despite the confidence of the police that they are able to use verbal and nonverbal behavioral cues to make accurate judgments, police investigators perform only slightly better than chance, if at all, in detecting deception (Bull, 1989; DePaulo, 1994; DePaul & Pfeiffer, 1986; Ekman & O'Sullivan, 1991; Ekman, O'Sullivan, & Frank, 1999; Koehnken, 1987; Porter et al., 2000), and "training" does not help on a consistent basis (Bull, 1989; Kassin & Fong, 1999; Porter, Woodworth & Birt, 2000; Vrij, 1994; Zuckerman, Koestner, & Alton, 1984; Zuckerman, Koestner, & Colella, 1985). In a study aimed at assessing the ability of police officers and college students to determine whether videotaped guilty or innocent suspects were lying versus being truthful, law enforcement personnel did not outperform the students. However, police officers were significantly more confident they were right despite their often erroneous judgments (Kassin & Fong, 1999).

Consider the findings of a recent study (Kassin, Goldstein, & Savitsky, 2003) that found that when investigators presume guilt, they put into motion a process known as "behavioral confirmation" wherein they select more guilt-presumptive questions, use more interrogation techniques such as the promise of leniency and presentation of false evidence, and exert more pressure to get a confession, particularly with subjects actually innocent. This process, more familiarly known as the self-fulfilling prophecy, tends to lead to aggressive, guilt-provoking interrogations, with the behavior of the suspects in response to such methods that of feeling constrained, thereby confirming the investigators' assumption of their guilt. The authors of the study note that erroneous prejudgment of guilt colors the information-gath-

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ering process such that plausible denials on the part of the defendant are discounted or misinterpreted.

As Kassin, et al .further conclude, it is hardly surprising that in the face of coercive interrogation techniques defendants become defensive such that they sigh in despair, slouch in their seats, and look away, supposedly classical signs of deception as noted in Inbau, Reid, Buckley, and Jaynes' *Criminal Interrogation and Confession* (2001), the bible of law enforcement investigators, now in its 4th edition. One of the authors of this book, in marked contrast to what is known in the social science literature about the inability of trained investigators to discern truth from lying any better than chance, nonetheless reports that investigators trained in their methods are able to distinguish truth from deception at an 85% accuracy level (http://www.reid.com/service-bai-interview.html).

That confirmation bias is alive and well is indicated in the case above, where the police officer, believing the alleged child victim was telling the truth and confident the suspect was guilty, testified that the defendant admitted to sexually molesting the child. Another individual present at this very same interrogation, caught off guard at finding himself unexpectedly called as a defense witness, testified to the contrary. Right to the very end of the interrogation, said this state witness, the defendant consistently maintained, in response to whether particular scenarios presented to him were "possible," that although anything was possible, nothing had happened but that if it did, it was by accident. Here we have two people present at the same interrogation, both of them state witnesses, who arrived at entirely different conclusions: one said the defendant admitted guilt and the other said he did not.

It is a common practice, even in First Degree murder cases, for investigators to "summarize" their interrogation findings. They then present this summary to the often by now cowed defendant to sign, who is typically in such a state of fright, confusion, and agitation that he has little comprehension of what he is actually signing, to his later chagrin. It then becomes the defendant's word versus that of law enforcement as to what actually may have transpired in the all too frequent absence of electronic recording. Of course, it cuts both ways. An electronic record of a defendant's statement, properly taken, can be very hard to challenge.

Despite the best of intentions, human memory is simply not accurate in recording every detail of what takes place in an interrogation, and details count when the stakes, notably life and liberty, are high. Memory may be inaccurate when there has been a delay of only a few seconds. This translates to memory being inaccurate when the writer is contemporaneously writing what the defendant is saying while the defendant is in the process of speaking, a practice, at least according to their testimony, favored by investigators. To the contrary, Ceci and Bruck (1995) found that when adults are asked to recall conversation or passages they have just heard that their memory fades within seconds. Rayner and Pollatsek (1989) determined that subjects tend to extract the meaning or gist of what they hear but forget the form or the exact wording. Warren and Woodall (1999) found in their study of experienced interviewers that their notes reflected only 20% of the questions they actually asked, leaving the misleading and potentially damaging impression that the information had been spontaneously provided.

Lamb, Orbach, Sternberg, Hershkowitz, and Horowitz (2000) compared the verbatim contemporaneous accounts of 20 investigative interviews with audiotaped recordings of these same interviews and found that the investigators' notes misrepresented both the information elicited and the way the information was elicited. They found that 57% of the interviewers' utterances as well as 25% of the incident-relevant details provided by those being interviewed were omitted from the so-called verbatim notes. In addition, the structure of the interviews was inaccurately represented in these accounts. Investigators systematically misidentified details as resulting from open rather than focused prompts. What is particularly disturbing about this study is that the investigators were among the best in the field, were well aware of their legal and moral responsibility to fully and completely record the interview structure and content as completely as possible and not to simply summarize, and knew the interviews were being recorded and that their verbatim notes would be compared to these recordings. The authors conclude, "These results underscore the superiority of electronic recording when the content and structure of investigative interviews must be preserved…interviewers cannot be expected to provide complete and accurate accounting of their interviews without electronic assistance."

In addition to the known research findings regarding the virtual impossibility of 100% accurate recall, a summary of an interrogation, aside from what we know about the often confirmatory bias of investigators, simply cannot capture the all-important pauses, nuances of speech, gestures, body language, number of times a question may have been asked, indications of whether the response was given spontaneously or in response to a prompt, and so forth. The officer above, for example, never mentioned in his "summary" or his testimony that "scenarios" were presented wherein the defendant was asked to respond to the "possibility" of something having happened, a far cry from spontaneously admitting guilt, as was this officer's testimony. He never described the young man's confusion in the face of being bombarded by questions from three interrogators, with this being a severely learning disabled individual with a lengthy, well-documented history of problems processing and understanding verbal material. Instead, the so-called summary statement presented an image of a much more verbally astute, respon-

sive, coherent, and competent individual than my interviews with him suggested, with the trier of fact now placed in the unenviable position of somehow reconciling grossly contradictory and inconsistent testimony. Listening to just a few minutes of an audiotape of the defendant's presentation during the interrogation might have clarified this.

The implications are all too obvious. The testimony of law enforcement can have a devastating effect on the credibility of a defendant to the trier of fact, who needs a true and accurate picture of the totality of the circumstances of the interrogation in order to provide this individual his constitutional right to due process. Although the family of the defendant who I was evaluating luckily had the financial resources to hire topnotch legal representation, who in turn hired an expert witness in an effort to bring these important issues to the attention of the court, one wonders how many defendants are not afforded this same opportunity and instead silently shuffle off to the penitentiary.

When police, trained in powerful, coercive interrogation techniques, armed with confirmatory bias as well as unbounded (and unfounded) confidence in their truth-detecting abilities, and motivated by career aspirations, conclude guilt and then misinterpret and/or misrepresent statements made to them by the defendant, as in the case above, they may set into motion a tragic chain of events ranging from increasing the likelihood of a false confession to facilitating an unjust conviction. All too common scenarios of this nature underscore the need for electronic recording of investigative interviews, preferably videotaped, rather than relying on the uncertain memory and fairness of law enforcement.

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Dr. McCoy specializes in death penalty mitigation. For further information, including a bibliography on mitigation and other articles written by Dr. McCoy, please visit her website, www.forensicpsychpages.com. ■

NO, IT IS *NOT* CRAZY, FROM AN EVIDENTIARY STANDPOINT, TO SEEK HELP FOR MENTAL ILLNESS: *U.S. V. HAYES*, THE 6TH CIRCUIT, AND THE "DANGEROUS PATIENT" EXCEPTION TO THE PSYCHOTHERAPIST/PATIENT TESTIMONIAL PRIVILEGE

That persons with mental health problems should seek professional help with their illness would seem to be beyond debate. The courts, and other drafters of public policy, should take steps to support this societal good. The United States 6th Circuit Court of Appeals has done so, having long recognized a psychotherapist/patient psychological privilege. *United States v. Hayes*, 227 F.3d 578, 581 (6th Cir. 2000). Addressing the question of whether a "dangerous patient" exception to this privilege should permit psychotherapists to testify at criminal proceedings against their former patients in certain situations, the 6th Circuit answered in the negative. The 6th Circuit (unlike the 10th and later the 9th), in its *Hayes* opinion, has acted positively to protect the mental health of our citizens and the greater safety of us all.

The creation of testimonial privileges has remained an issue of common law, despite the adoption of the Federal Rules of Evidence. Fed.R.Evid. 501, quoted *Id.* The Supreme Court recognized the psychotherapist/patient privilege in *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996), *Id.*, at 581-82. The high Court opined the privilege would benefit the public by improving the mental health of the people, and called this "a public good of transcendent importance." *Jaffee* at 11, quoted *Id.*, at 582. The Court, however, left the particulars of when to apply the privilege to the lower courts. *Id.*, at 582.

The 10th Circuit, in *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998), became the first court of appeals to recognize an exception to the *Jaffee* psychotherapist/patient testimonial privilege. *Id.* The 10th Circuit exception to the *Jaffee* privilege exists only where:

1. The threat [made to the psychotherapist by the patient about a third party] was serious when made and,
2. Disclosure was literally the only means of averting harm.

Id., citing *Glass* at 1359.

The question before the court in *Hayes*, therefore, was whether the 10th Circuit's *Glass* exception to the *Jaffee* privilege should be adopted by the 6th Circuit. *Id.*, at 583. As we discuss below, the 6th Circuit wisely declined to adopt the *Glass* exception in its ruling.

Robert Stephens

Most states have "duty to protect" statutes which require psychotherapists to warn third parties of credible threats from patients. *Id.* This promotes the public good by preventing threatened harm by patients upon third parties. This legislation came into being after the California Supreme Court found a duty to protect under similar circumstances in *Tarasoff v. Regents of the University of California* 551 P.2d 334 (Cal. 1976). *Id.* If someone credibly tells his or her mental health professional that he is planning to kill a third person, of course it makes sense as a matter of public policy that the professional be permitted, even encouraged or required, to report the danger and prevent the harm which is apparently about to occur.

The parties in *Hayes*, and the 10 the Circuit, erred by associating the "duty to protect" of a psychotherapist with the issue of whether an exception to the psychotherapist/patient testimonial privilege should exist in criminal cases. *Id.*, at 583-84. A psychotherapist's "duty to protect" deals with prevention of pending credible harm to a third party, and the public benefits from such a rule by having the potential crime averted.

> We see only a marginal connection, if any at all, between a psychotherapist's action in notifying a third party (for his own safety) of a patient's threat to kill or injure him and a court's refusal to permit the therapist to testify about such threat (in the interest of protecting the psychotherapist/patient relationship) in a later prosecution of the patient for making it. State law requirements that psychotherapists take action to prevent serious and credible threats from being carried out serve a far more immediate function than the proposed "dangerous patient" exception. *Id.*

The testimonial privilege which a patient can assert to prevent the disclosure of confidences made to his or her psychotherapist has the public goal of encouraging persons

with mental health problems to *seek help before they commit a potentially criminal act*. One should be "applauded," the court lauded, for seeking help with one's mental problems. *Id.*, at 584. To permit a "dangerous patient" exception to the testimonial privilege, the 6th Circuit reasoned, would "chill and very likely terminate open dialogue" in the psychotherapist/patient relationship. *Id.*, at 585. Ironically, this would most affect the *mental health relationships most in need* of correct diagnosis and treatment, *before* the illness manifests itself in dangerous action.

While the 6th Circuit acknowledges the testimonial privilege question involves the competing interests of patient mental health and protection of third parties, the court also notes the end of protecting third parties does not justify the method proposed. *Id.* Psychotherapists can still act to protect third parties, as in the "duty to protect" situation, with the patient getting the required hospitalization and eventual treatment. *Id.* Placing a patient in prison will not likely benefit the patient's mental health and will leave a stigma upon release. *Id.*

Indeed, as the *Hayes* court notes, the testimonial privilege, unlike "duty to protect" situations, applies only where court proceedings have already started, and the threat is therefore minimal. *Id.*, at 584.

> Unlike the situation presented in *Tarasoff*, the threat articulated by a defendant such as Hayes is rather unlikely to be carried out once court proceedings have begun against him. *Id.*

The 6th Circuit, then, has held that there is no "dangerous patient" exception to the *Jaffee* psychotherapist/patient privilege. As the court summarizes its opinion:

> We hold, therefore, that the federal psychotherapist/patient privilege does not impede a psychotherapist's compliance with his professional and ethical duty to protect innocent third parties, a duty which may require, among other things, disclosure to third parties or testimony at an involuntary hospitalization proceeding. Conversely, compliance with the professional duty to protect does not imply a duty to testify against a patient in criminal proceedings or in civil proceedings other than directly related to the patient's involuntary hospitalization, and such testimony is privileged and inadmissable [sic.] if a patient properly asserts the psychotherapist/patient privilege. *Id.*, at 586.

The 6th Circuit has thus taken a strong stand in promoting the mental health of our citizens. While psychotherapists can still act to stop credible, immediate threats to third persons, confidences gained by the psychotherapist cannot be used in subsequent criminal prosecutions of the patient.[1] Other courts have taken a different position. The 10th Circuit created the *Glass* exception rejected by the 6th Circuit in *Hayes*. The 9th Circuit has taken the same position as the court in *Glass*. *United States v. Chase*, 301 F.3d 1019, at 1024, see esp. footnote 2 (9th Cir. 2002). Ultimately, the question of whether *Jaffee* permitted the subsequent establishment of the "dangerous patient" exception as in *Glass* and *Chase* may need to be settled by the Supreme Court. Until then, we will have to see if other courts follow *Hayes*, or if they choose to follow *Jaffee*'s less beneficent, even if slightly more numerous, progeny.

What will be the effect, however, if other circuits recognize a "dangerous patient" exception to the *Jaffee* privilege? The *Hayes* opinion drew upon strong language of the Supreme Court addressing the "transcendent importance," *Hayes*, at 582, of the mental health of American citizens. Permitting a psychotherapist to break the confidence placed in him by a patient desiring treatment, not to prevent a credible and immediate harm to a third party, but rather to convict the patient in a subsequent criminal proceeding, can only freeze or destroy the very basis for the treatment. In fact, it seems unjust to so casually break the confidence placed on the so-called mental health professional. What crime will be prevented by this measure, since it usually will be used only after the chance of commission has long-passed? If a crime might be prevented through the "dangerous patient" exception, could it not have been prevented as envisaged by the "duty to protect" statutes, by getting immediate warning and hospitalization for the patient; a much less stigmatizing method for (one hesitates to call it an alternative to) treating the mentally ill than criminal prosecution? The realistic outcome of a "dangerous patient" exception to the psychotherapist/patient evidentiary privilege will be that fewer mentally ill persons will seek preemptive help for their feelings and dangerous intentions, and will instead finally give in to them to the detriment of an unwitting third party. To adopt the "dangerous patient" exception is to replace workable, compassionate preemption in many cases with prosecution of a few unfortunate souls: a calculus which leaves all of us less safe and which must not be adopted by the courts.

Endnotes:

1. Unless the privilege is properly waived by the patient, but this is more difficult to achieve than with "normal" patient/defendants. The 6th Circuit said in *Hayes*, because of the unique needs of such patient/defendants, "Consequently, it must be the law that, in order to secure a valid waiver of the protections of the psychotherapist/patient privilege from a patient, a psychotherapist must provide that patient with an explanation of the consequences of that waiver suited to the unique needs of that patient." *Id.*, at 587. ■

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In the Spotlight….Kimberly Boyd

Sunshine on roller skates. Her smile lights the way. It's the first thing you see when you meet Kimberly Boyd, an Administrative Specialist in the Paducah Public Advocate's Office. She speaks calmly and quickly. In her office, surfaces are clean, paperwork is neatly stacked, lamps light the room and a spicy candle scents the room. It is an oasis of calm. Beneath this calm exterior, though, springs are ready to jump into action.

If the attorneys are the front line soldiers of public service, the secretaries and administrative specialists are the scouts, the medics, the messengers and the flag bearers. Their positions are sometimes more difficult because while dodging bullets they must also administer to the needs of the troops… providing valuable information, clearing paths and keeping them alive. They are the great unsung heroes. Kimberly Boyd, a 14-year veteran of the Paducah Office, exemplifies the best of the best.

Her directing attorney, Chris McNeill, can't say enough about her. Asked about her contributions, he says, "Kim is probably one of the most valuable assets in this office and one of the most valuable assets in all of DPA, really. She has knowledge, experience, skill, good attitude and professionalism." He pauses and then nods, "Yeah, she's just awesome."

Kimberly got her first degree as a Legal Secretary from Paducah Community College in May of 1977, then a Business Administration degree from Murray State in December of 1978. Her first job was with Western Kentucky Legal Services. She worked there for 3 years and loved it. After having her first child, she had to leave the agency but fondly recalls that first introduction into legal work and helping indigent clients.

Another child came along and Kimberly worked a number of jobs. Her experiences include motel manager, bill collector and legal secretary. Her marriage crumbled, leaving Kimberly to raise two small boys, ages 2 and 4 on her own. They are now both in college. The oldest majors in Film and Theatre in Lexington and the youngest studies pre-dental orthodontics at Murray State. Her pride is palpable when she speaks of them and their achievements.

Following the turmoil of the divorce, she worked a number of jobs through a temp agency, including a four-month stint as production secretary for a movie filmed in Paducah and also as secretary in the county attorney's office. Of that position, she says, "I didn't like working there because basically they were putting people in prison and I didn't think that was necessarily the answer all the time. I'd rather be on the helping side than the prosecuting side." That's when she was hired into the Public Advocate's Office and found her niche.

She says the most satisfying part of her job is, "Knowing that I can help in some small way people who are less fortunate than us, no matter what that is. . . .I love every aspect of my job. I love the people I work with. I look forward to coming here every day."

She credits her parents, particularly her mother, Ann, for setting the stage. "My mother was very instrumental in forming my early values, to always do what you can to help others. She is an inspiration to me." It shows. Kimberly inspires everyone around her.

When she speaks of working with the clients, she smiles but then a cloud passes over her features. She recalls a recent phone call with a client who had just received a surprisingly ugly sentence, "He was devastated, of course, and he called here and just wanted to talk to someone. . anyone. I sat here well after the office closed to just let him talk. Some of these people have just never had anybody sit and listen to them."

Handling the multitude of client phone calls is a vital aspect of every secretary's job in a pubic advocacy office. Kimberly shakes her head, "(The) challenge is trying to be sensitive to the needs of the clients when they don't understand that their attorney has this huge caseload. It's especially hard for those who are facing criminal charges for the first time. They are floundering in foreign territory. . they really feel like they're in the dark."

For every struggling client, Kimberly is there to listen and to stretch out a hand and it seems to energize her. Her face brightens when she speaks of her job, "I LOVE what I do. I have to be in a helping profession. This is the job I'm supposed to be doing." ■

Patti Heying
Program Coordinator

Across the country, governments commonly spend three times as much on prosecution as on public defense...

-- Justice Expenditure and Employment, Bureau of Justice Statistics, U.S. Department of Justice, 1990.

"There's no doubt in my mind that there are innocent people at the penitentiary right now ... Frequently, we did not know the facts behind the case before entering a guilty plea."

-- A retired public defender from Quitman County, Mississippi, who was so short on resources that he could not hire an investigator for any of the non-capital cases he handled over 10 years.

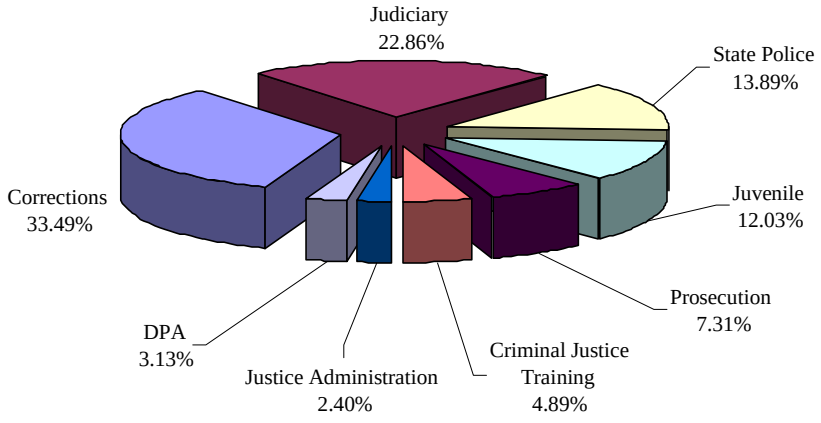
Public defenders should have the same access to the same resources as prosecutors, including legal research, investigators, experts or scientific testing. But in many states across the country, they do not…. Forty years ago, the U.S. Supreme Court ruled in the landmark case of *Gideon v. Wainwright* that the Constitution guarantees access to legal representation for all Americans facing criminal charges. However, in many courtrooms across the country, public defense attorneys do not have access to the same resources that are available for other branches of the court system. This lack of resources puts public defense attorneys at a disadvantage in trying to fulfill their critical role in the justice system. If the resources placed on the scales of justice are not in balance, we do not have a fair justice system. Public defense should participate as an equal partner in the justice system and there should be parity between the resources available to the defense counsel and the prosecution. **No Exceptions**.

To learn more about the campaign and the issues, visit www.NoExceptions.org.

NO EXCEPTIONS
It's the American Way

CRIMINAL JUSTICE FUNDING IN KENTUCKY: FISCAL YEAR 2004 (REVISED)

Percentage of Criminal Justice Funding for Each Kentucky Criminal Justice Program in FY 04:



Corrections	$335,452,700	33.49%
Judiciary	$228,979,500	22.86%
State Police	$139,114,500	13.89%
Juvenile	$120,506,900	12.03%
Prosecution	$73,179,000	7.31%
Criminal Justice Training	$48,941,100	4.89%
DPA	$31,395,700	3.13%
Justice Administration	$24,049,500	2.40%
Total	$1,001,618,900	100%

PLAIN VIEW . . .

Ernie Lewis, Public Advocate

***Maryland v. Pringle*,**
124 S.Ct. 795 (2003)

This is a short, unanimous opinion. Brevity and unanimity should not, however, be interpreted to mean that it is not also a very significant decision.

Pringle was driving with two other men in Baltimore, Maryland, early on August 7, 1999, when the car in which he was riding was stopped for speeding. Pringle was in the front passenger seat of the car. In the glove compartment was $763 in cash. In the back seat armrest was 5 glassine baggies containing cocaine. The officer saw the money when the driver, Donte Partlow, reached for his vehicle registration. The officer issued an oral warning when everything checked out on the vehicle and on Partlow.

At that point, however, the officer asked Partlow for consent to search the car for weapons or narcotics. Partlow agreed, and a full search of the car revealed the baggies of cocaine. The police asked whose cocaine it was, and when none of the 3 claimed it, all three were arrested. Pringle eventually confessed to the cocaine being his, and he was convicted of possession with intent to distribute, and was sentenced to 10 years in prison. However, the Maryland Court of Appeals reversed the conviction, holding that "'the mere finding of cocaine in the back armrest when [Pringle] was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession.'" The Supreme Court granted *certiorari*, and in a unanimous opinion written by the Chief Justice, reversed the Maryland Court of Appeals.

The issue in the case was a simple one due to the facts of the case. "The sole question is whether the officer had probable cause to believe that Pringle committed that crime." At first blush, one would think that the fact that cocaine is found in a car in which 3 people are riding, would not make it "probable" that any one of the three was in possession of it. If one held that commonsense view, one would be wrong.

The Court took the opportunity to explore once again the meaning of probable cause. The Court reiterated that the "probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends upon the totality of the circumstances." Citing *Brinegar v. United States*, 388 U.S. 160 (1949), the Court noted that the "'substance of all the definitions of probable cause is a reasonable ground for belief of guilt.'"

In order to determine whether probable cause existed, "we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause, *Ornelas, supra,* at 696." Based upon this process, the Court noted that Pringle was one of three men in a car at 3:16 a.m. with money in the glove compartment and cocaine in the back armrest. The Court criticized the Court of Appeals of Maryland for disregarding the importance of $763 being found in the glove compartment. Based upon this, the Court thought "it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus, a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly."

The Court distinguished two cases that appeared to mandate a different result. Most recently, *Ybarra v. Illinois*, 444 U.S. 85 (1979), did not apply because of the nature of the place where the defendant was at the time of the seizure. Pringle was in a small vehicle with only 2 others, while Ybarra was one of many in a tavern. "Here we think it was reasonable for the officer to infer a common enterprise among the three men."

The Court also distinguished the older case of *United States v. Di Re*, 332 U.S. 581 (1948). There, Reed told the police that he was going to receive counterfeit gasoline ration coupons from Buttitta. The police went to the place where the transaction was to take place and saw Reed with the coupons. Buttitta and Di Re were in the front seat of the car. Reed told the police that Buttitta had given him the coupons. All three men were arrested. The Court held that the police had lacked probable cause to arrest Di Re. The Court stated in *Di Re* that "'[a]ny inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person…'No such singling out occurred in this case; none of the three men provided information with respect to the ownership of the cocaine or money."

This case may have an impact on a settled area of Kentucky case law. The facts are virtually identical to the Kentucky case, *Paul v. Commonwealth*, Ky. App., 765 S.W. 2d 24 (1988). There, the Court of Appeals held that the officer had no probable cause to arrest Paul, a passenger, citing both *Di Re* and *Ybarra*. Several other Kentucky case holdings may likewise be effected. *See*, for example, *Mobley v. Commonwealth*, Ky. App., ___S.W. 3rd___ (2003); *Leavell v. Commonwealth*, Ky., 737 S.W. 2d 695 (1987).

***Illinois v. Lidster*,**
124 S.Ct. 885 (2004)

The Court has issued another significant Fourth Amendment decision. Again, the Court overturns a favorable Fourth Amendment opinion rendered by the highest court of a state. Here, they revisit the developing area of when law enforcement may set up a roadblock and for what reason.

This case began with the midnight hit-and-run death of a bicyclist on a highway in Lombard, Illinois. A week later, at about the same time of the night, the police set up a checkpoint "designed to obtain more information about the accident from the motoring public." Cars were stopped for 10-15 seconds during which the police would ask whether they had seen anything the week before; a flyer was also handed to the driver describing the hit-and-run.

One of the motorists stopped was Robert Lidster who had the misfortune of swerving as he approached the police. Alcohol was smelled on Lidster's breath by the officer, who arrested Lidster for DUI after he failed a field sobriety test. Lidster was tried and convicted of DUI. His challenge to the legality of his arrest was rejected by the trial court, but agreed to by both the Illinois Court of Appeals and Supreme Court. The latter court held that *Indianapolis v. Edmond*, 531 U.S. 32 (2000), required a finding that the stop had been unconstitutional because the roadblock had a law enforcement purpose.

The Court granted *cert* and overruled the decision below. Justice Breyer wrote the decision, joined by Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas for all of the opinion, and Stevens, Souter, and Ginsburg for parts of the decision. The Court first distinguished the facts of this case from *Edmond*. "The Checkpoint stop here differs significantly from that in *Edmond*. The stop's primary law enforcement purpose was not to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals."

The Court also stated independently of *Edmond* why this stopping did not violate the Fourth Amendment. First, this case involved a motorist. "The Fourth Amendment does not treat a motorist's car as his castle." Second, special concerns of law enforcement sometimes justify a stopping without individualized suspicion. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). Further, where the police are seeking information, "the concept of individualized suspicion has little role to play." In addition, "information-seeking highway stops are less likely to provoke anxiety or to prove intrusive." Finally, there is nothing wrong with the police seeking voluntary cooperation from the public when investigating a crime. The Court compared this to the approaching of a pedestrian and engaging them in conversation, which the Court had held constitutional in *Florida v. Royer*, 469 U.S. 491 (1983).

Under these factors, the Court found the stop and Lidster's ultimate arrest to have been constitutional. "The relevant public concern was grave…The stop advanced this grave public concern to a significant degree…Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line—a very few minutes at most…Police contact consisted simply of a request for information and the distribution of a flyer…Viewed subjectively, the contact provided little reason for anxiety or alarm."

This case is limited in its scope. The Court made clear that the "Fourth Amendment's normal insistence that the stop be reasonable in context will still provide an important legal limitation on police use of this kind of information-seeking checkpoint."

Justice Stevens, joined by Souter and Ginsburg, concurred in part and dissented in part. They concurred in those parts of the case distinguishing the law enforcement roadblock from the information-seeking roadblock. However, they would have remanded the case back to the Illinois Court for additional analysis to apply *Brown v. Texas*, 443 U.S. 47 (1979).

Commonwealth v. Buchanon, Ky., 122 S.W.3d 565 (2003)

On September 5, 1999, Butler County Sheriff's Department set up a roadblock stopping all cars in both directions on Highway 70. David Buchanon was driving to work at 6:30 p.m. A "spotter" notified the roadblock that "there was a lot of abnormal movement coming from inside the vehicle." Buchanon stopped at the roadblock and was asked to produce his license and registration. The officer smelled cologne coming from the car, and observed Buchanon as being "'real nervous'" with a red face and bloodshot eyes. The officer asked Buchanon to get out of the car. Buchanon passed two field sobriety tests. Buchanon then refused to allow a search of his car. The officer asked for a drug dog to sniff the car. When the dog alerted, Buchanon's car was searched and controlled substances were found.

Buchanon filed a motion to suppress in the trial court on the grounds that the roadblock was unconstitutional under *Indianapolis v. Edmond*, 531 U.S. 32 (2000). The trial court overruled the motion. Buchanon entered a conditional plea of guilty, and appealed. The Court of Appeals reversed and held that search to have been unconstitutional. The Kentucky Supreme Court granted discretionary review.

In an opinion written by Justice Stumbo, the Kentucky Supreme Court affirmed the Court of Appeals. The Court relied extensively on *Edmond*, noting that the constitutionality of checkpoint programs "'still depends on a balancing of the competing interests at stake and the effectiveness of the program.'…However, the Court added that it would now be necessary for courts to conduct a purpose inquiry at the programmatic level in order to determine if the program is justified by a lawful primary purpose…The *Edmond* Court determined that a primary purpose of general crime control, i.e., 'interdicting illegal narcotics,' did not justify a checkpoint program that

Continued on page 52

Continued from page 51
stopped motorists without some indicia of individualized suspicion."

The Court then applied a detailed analysis of this particular checkpoint under the *Edmond* standards. Particularly noteworthy was that the purpose of the roadblock was to detect any violation of the law, that no one at the checkpoint except one officer had any training in DUI detection, that a PBT was not administered to Buchanon because the officer did not smell alcohol, that the roadblock was conducted in the afternoon with a drug dog present, and that there was no written plan detailing the policies and procedures governing the roadblock. The Court held that "the primary purpose of the roadblock in the case *sub judice* was to detect narcotics or 'any violation of the law.'" As a result, the roadblock was unconstitutional, and the evidence seized from Buchanon had to be suppressed.

Interestingly, the Court recommended that in the future, law enforcement officials follow some simple guidelines. First, "it is important that decisions regarding the location, time, and procedures governing a particular roadblock should be determined by those law enforcement officials in a supervisory position, rather than by the officers who are out in the field." Second, "the law enforcement officials who work the roadblock should comply with the procedures established by their superior officers so that each motorist is dealt with in exactly the same manner." Third, "the nature of the roadblock should be readily apparent to approaching motorists." Fourth, "the length of a stop is an important factor in determining the intrusiveness of the roadblock. Motorists should not be detained any longer than necessary in order to perform a cursory examination of the vehicle to look for signs of intoxication or check for license and registration." "We reiterate that the above list of factors is not exhaustive. Also, a mere violation of one factor does not automatically result in a violation of constitutional proportions. The guidelines are to be applied on a case-by-case basis in order to determine the reasonableness of each roadblock."

Justice Graves dissented jointed by Justices Keller and Wintersheimer. The dissenters believed that under *Edmond* it was "permissible to establish a valid sobriety check point that has a secondary or collateral purpose of drug interdiction."

Buchanon was written prior to the decision in *Lidster*. However, it is doubtful whether there would be any change in the Court's decision had *Lidster* occurred prior to *Buchanon*. *Buchanon* falls clearly within the *Edmond* law enforcement checkpoint. *Lidster* has now carved out an exception for those rare checkpoints occurring to seek information about a prior crime.

United States v. Berryhill, 352 F.3d 315 (6th Cir. 2003)

Berryhill was asked to come to an apartment by a guest there, without the knowledge of the tenant. He went to the apartment without any luggage, carrying only items to assist in manufacturing methamphetamine. When he was charged with a crime based upon a search, he moved to suppress. The district court ruled that Berryhill had no reasonable expectation of privacy, and thus could not challenge the search. He appealed to the Sixth Circuit.

Judge Norris wrote the opinion for the Sixth Circuit affirming the lower court. Few facts are included in the opinion. Rather, Judge Norris relies heavily upon the fact-finding conducted by the district court. "The district court found that Berryhill had not been invited to the apartment by its tenant…The district court found that Berryhill failed to meet his burden of showing that he had a reasonable expectation of privacy in the searched apartment, basing its conclusion on two grounds: first, that Berryhill did not intend to stay at the apartment overnight, and second, that he unreasonably relied upon a guest's invitation to enter the apartment given without the direct or indirect knowledge of the lawful tenant or owner."

The Court rejected Berryhill's assertion that Minnesota v. Olson, 495 U.s. 91 (1990) could be relied upon for establishing a reasonable expectation of privacy by someone who was an overnight guest without the tenant's permission or knowledge "[T]he reason a houseguest has a reasonable expectation of privacy is because he knows that the host would respect his privacy, having obtained the host's permission to be at the residence. *Olson* cannot be taken for the proposition that guests' visitors can be assured that their privacy will be respected by the lawful owners or tenants of the residence."

United States v. Hammond, 351 F.3d 765 (6th Cir. 2003)

In 1999, Detective Tim Engle applied for a warrant to search the property of Clifton Hammond. He indicated in his affidavit that Jeremy Holt had told him 4 months before that Hammond had an indoor marijuana operation in Rockcastle County, Kentucky. The affidavit also stated that the Rockcastle County Sheriff's Office had received several complaints about someone growing marijuana at the Hammond residence. The affidavit contained several misstatements and inaccuracies that were significant. The state judge issued the search warrant, and marijuana, firearms, and electric blasting caps were seized. Hammond was charged with in federal court with manufacturing more than 50 marijuana plants, possession of methamphetamine, and possessing weapons and destructive devices during a drug trafficking crime. His motion to suppress was denied, and he entered a plea of guilty. He appealed.

The Sixth Circuit reversed in an opinion by Chief Judge Boggs, joined by Judges Guy and Nelson. The Court held that everything in the affidavit other than Holt's tip and several anonymous phone calls regarding the Hammond marijuana operation "was either the result of a mistake, a fabrication, or cannot legally be considered." The Court rejected the defendant's argument that Holt's tip was stale, saying that "the crime of drug trafficking is ongoing, the defendant's location is established, the drugs were likely to be there for an indefinite period of time, and the place to be searched constituted a secure operational base." However, the tip itself was "vague, not

obviously reliable, and entirely unsupported by any independent investigation on the part of the police." Detective Engle had not indicated anything in the affidavit regarding the reliability of Holt. Nor was Holt's tip corroborated by independent investigation in any significant way. Therefore, the "information left for us to rely on for probable cause in this case is insufficient."

The Court thereafter rejected the government's call for good faith reliance on the judge's warrant. The Court relied upon 1 of the 4 exceptions to the good faith exception contained in *United States v. Leon*, 468 U.S. 897 (1984): "the supporting affidavit contained knowing or reckless falsity." The Court noted that there "is no question that Officer Engle acted with reckless disregard for the truth in view of the remarkable inaccuracies presented in his affidavit…This is not the case in which an officer made a small error in the affidavit, when applying for a warrant. The number of falsehoods and half-truths told are substantial and reflect, at the very least, a reckless disregard for the truth."

SHORT VIEW . . .

1. ***United States v. Maple***, 348 F.3d 260 (D.C. Cir. 2003). This is a case where *Whren v. United States*, 517 U.S. 806 (1996) has actually come in handy. Here, a speeder was picked up and then arrested for driving on a suspended license. The officer decided to park the car in a safe lot rather than impound it. He saw a cell phone on the floor, and decided to put it into a console of the car. When he opened the console, he saw a handgun; a search of the car resulted in the finding of cocaine. The district court had sustained the search under the community caretaking exception. However, after the original DC opinion had affirmed the district court, the Court reversed on petition for rehearing. This time the Court held that the opening of the console was a search done without a warrant and without probable cause. The Court used *Whren* to reject the government's argument that the search was not illegal because the officer was not intending to search for evidence but was rather trying to take care of the arrestee's property.

2. ***United States v. Boyce***, 351 F.3d 1102 (11th Cir. 2003). The Eleventh Circuit Court of Appeals has held that when a police officer extends a detention in order to perform a computer check on outstanding warrants this requires reasonable and articulable suspicion. Here, the officer had arrested Boyce for weaving on the interstate. After checking his rental car contract and his driver's license, he was issued a "courtesy warning." However, when the defendant denied consent to search the car, the officer called for a drug-detection unit, and called for a criminal history check. The canine unit arrived before the warrant information. The dog alerted, and a search revealed marijuana and ecstasy pills. The 11th Circuit held that once the courtesy warning had been issued, the police had to have a reasonable and articulable suspicion in order to continue to detain the defendant for purposes of conducting a check on outstanding warrants. The Court noted that had the police officer ordered the warrants check at the same time as the license check as part of the routine traffic stop, the search would have been legal. The added time of detention is what violated the Fourth Amendment.

3. ***Randolph v. State***, 2003 WL 22846341, 2003 Ga. App. LEXIS 1499 (Ga. Ct. App. 2003). When the police ask for consent to search the house of a couple, receive consent from one spouse, but an objection from the other spouse, the consent will not allow for a search of the house, according to the Georgia Court of Appeals. This occurred when the police responded to a domestic violence call. The wife complained about her husband's cocaine use. When the defendant refused consent to search the house, the officer turned to the wife who gave consent. The Court stated that it was "reasonable for one occupant to believe that his stated desire for privacy will be honored, even if there is another occupant who could consent to a search." The Court noted that the right involved is the right to privacy, not the right to invite the police into the home.

4. ***Theodore v. Delaware Valley School District,*** 837 A.2d 1186 (Pa. 2003). The Pennsylvania Constitution gives broader protections than the Fourth Amendment, according to the Pennsylvania Supreme Court. Here, the Court outlawed random drug testing for students who drive to school or participate in extracurricular activities. The policy was virtually identical to that approved in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). Such a policy would be constitutional if justified by a specific drug or alcohol problem.

5. ***Spencer v. Bay City***, 292 F.Supp.2d 932 (E.D. Mich. 2003). A city ordinance allowing for the taking of preliminary breath tests upon reasonable cause to believe a person under 21 has consumed alcohol is unconstitutional. The Court rejected a special needs argument, saying that the ordinance had as its primary purpose the prosecution of offenders.

6. ***United States v. Kincade***, 345 F.3d 1095 (9th Cir. 2003). The 9th Circuit has questioned the future of DNA databases that are being constructed throughout the country by requiring broad groups of inmates to have samples taken from them. Here, the Court held that extracting blood from federal violent offenders violates the 4th Amendment when accomplished without a warrant or individualized suspicion. The Court held that the extraction of blood was a search for 4th Amendment purposes. The Court rejected the assertion that this practice could be justified as a special needs search, relying upon *Indianapolis, Ind. v. Edmond*, 531 U.S. 32 (2000) and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). This case calls into question numerous state and federal laws creating these databases.

7. ***State v. Goss***, 834 A.2d 316 (N.H. 2003). Under the New Hampshire Constitution, there is a reasonable expectation in privacy in one's garbage, a distinction from the 4th Amendment's interpretation in *California v. Greenwood*, 486 U.S. 35 (1988). Thus, a warrant would be required before the police can rummage through someone's garbage left at the curb. ■

Ernie Lewis, Public Advocate

APPELLATE CASE REVIEW

Kent Hill v. Commonwealth of Kentucky,
Ky., __ S.W.3d __ (01/22/04)
(Reversing and remanding for a new trial)

While serving a sentence at the Green River Correctional Complex (GRCC) for a prior conviction, Hill was charged with engaging in organized crime and of being a persistent felony offender in the first degree. The indictment for engaging in organized crime charged that Hill had organized and participated with five other individuals in organizing a criminal syndicate to smuggle marijuana into GRCC for the purposed of trafficking in a controlled substance. Hill pled not guilty and initially moved to proceed *pro se*. However, once counsel was appointed, Hill requested only to serve as "co-counsel" so that he, rather than his attorney, could perform the direct and cross-examinations of some of the witnesses. The trial court granted Hill's request, but without holding a hearing, providing any warnings, or making a finding that he was knowingly and intelligently exercising a limited waiver of his right to counsel. The trial court's only admonishment was that it would not allow both Hill and his attorney to examine the same witness. Hill was ultimately convicted and sentenced to 20 years in prison.

Failure to hold *Faretta* hearing to determine if Hill's request to serve as co-counsel was knowing, intelligent, and voluntary violated his right to counsel under the Sixth Amendment and Ky. Const. §11. On appeal, Hill argued that he was denied his Sixth Amendment right to counsel because the trial court did not hold a hearing under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), in response to his request to act as co-counsel for himself. After first finding that a defendant has the right to make a limited waiver of counsel in Kentucky, and act as co-counsel, the Kentucky Supreme Court ruled that a trial court's *Faretta* duties manifest themselves in three concrete ways. First, the trial court must hold a hearing in which the defendant testifies on the question of whether the waiver is voluntary, knowing, and intelligent. Second, during the hearing, the trial court must warn the defendant of the hazards arising from and the benefits relinquished by waiving counsel. Third, the trial court must make a finding on the record that the waiver is knowing, intelligent, and voluntary. The Court made clear that a waiver of counsel is ineffective unless all three requirements are met.

In Hill's case, because the trial court failed to hold a *Faretta* hearing, issue warnings, and make a finding as to whether Hill's waiver was knowing, intelligent, and voluntary, reversal for a new trial was required. It is important to note that the Court found this type of error to be a "structural error," as opposed to a mere "trial error." Quoting *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the Court pointed out that trial errors occur during the presentation of the case to the jury and "'may be quantitatively assessed in the context of other evidence presented in order to determine whether such errors are harmless beyond a reasonable doubt.'" *Id*. at 307-08, 111 S.Ct. at 1256. However, "structural errors" affect the framework within which the trial proceeds. "'Structural defects in the constitution of the trial mechanism' require automatic reversal." *Id.* at 309, 111 S.Ct. at 1265. Therefore, the failure to follow the three-pronged *Faretta* procedure outlined above is not subject to harmless error analysis, but requires automatic reversal for a new trial.

Evidence sufficient for conviction of engaging in organized crime. Hill also argued that there was insufficient evidence to support findings that (1) the "collaboration" occurred "on a continuing basis;" and (2) that the criminal syndicate was "collaborating to promote or engage in illegal trafficking in controlled substances," as is required under KRS 506.120. The Court found no merit in either contention.

As to the "continuing basis" element, while Hill argued that five months duration was insufficient as a matter of law to constitute a "continuing basis," the Court held that no specific duration is required as long as the jury can find that the collaboration occurred on a continuing basis. The Court also emphasized that the evidence supported the conclusion that the marijuana operation would have continued indefinitely if not discovered by the authorities.

Regarding the "illegal trafficking" element, while Hill argued that there was no proof offered at trial that the substance was, in fact, marijuana, the Court held that conviction may premised on circumstantial evidence alone. Moreover, the Court noted that the Commonwealth was not required to prove that Appellant actually trafficked in marijuana to convict him of engaging in organized crime under KRS 506.120 because trafficking in a controlled substance is not a part of that offense. Rather, evidence of trafficking is required to prove that the entity organized by Hill, was, in fact, a criminal syndicate ("Collaborating to promote or engage in trafficking in a controlled substance is, *inter alia*, a part of the definition of a criminal syndicate.").

Presumption of innocence not violated by use of restraint (leg shackles) throughout the trial under the specific facts of Hill's case. Finally, Hill argued that the trial court's order to restrain him by leg shackles throughout the trial violated his constitutional right to be presumed innocent. Hill further contended that the order was doubly prejudicial because he was acting as co-counsel in his case. After acknowledging that absent special circumstances, an accused should not be forced to face the jury in shackles, the Court found that the trial court did not abuse its discretion in this case given Hill's history of escape or planned escapes from custody. The Court also noted that the trial court admonished the jury that it was not to hold the fact that Hill was in leg restraints against him.

However, on remand, the Court suggested that other less restrictive or prejudicial means might be employed, such as a larger security force in the courtroom.

Justice Wintersheimer dissented, joined by Chief Justice Lambert and Justice Graves. In Justice Wintersheimer's view, Hill did not demonstrate that his participation in the case as co-counsel prejudiced him in any way. Moreover, the evidence of Hill's guilt was overwhelming. Therefore, any possible error was harmless.

James Phelps v. Commonwealth of Kentucky,
Ky., __S.W.3d__ (01/22/04)
(Reversing and remanding for a new juvenile transfer hearing)

Phelps, a juvenile at the time of his indictment, entered a conditional guilty plea in Madison Circuit Court to receiving stolen property over $300 and carrying a concealed deadly weapon, second offense. In exchange for the plea, the Commonwealth agreed to dismiss the charges of unauthorized use of a motor vehicle, second offense, and possession of a firearm by a convicted felon. Phelps was sentenced to five years in prison. He specifically reserved the right to appeal the Circuit Court's denial of his motion to dismiss the indictment due to certain counts being enhanced based on his prior juvenile offenses. A divided panel of the Court of Appeals of Kentucky affirmed the Madison Circuit Court's decision to uphold the indictment and rejected Phelps' argument the KRS 635.040 of the Juvenile Code precluded any reliance on his prior juvenile offenses as the basis for enhancing the counts in the current indictment. The Supreme Court of Kentucky accepted discretionary review of the case in order to resolve whether juvenile court "adjudications" could properly be deemed "convictions" for the purpose of enhancing such criminal charges as unauthorized use of a motor vehicle (KRS 514.100), carrying a concealed deadly weapon (KRS 527.020), and possession of a firearm by a convicted felon (KRS 527.040).

KRS 635.040 provides in relevant part that "[n]o adjudication by a juvenile session of District Court shall be deemed a conviction, …." The Commonwealth argued, and the courts below agreed, that it would be absurd to interpret KRS 635.040 as applying to a situation such as Phelps' case because the effect would be to preclude juveniles from being charged with certain felony offenses that require a prior "conviction," such as possession of a firearm by a convicted felon and many of the drug offenses contained in KRS Chapter 218A. The Commonwealth contended that the legislature did not intend that juveniles be excluded from the purview of such offenses and that the Supreme Court should construe KRS 635.040 as pertaining primarily to the protection of juveniles' civil rights as they relate to privacy issues concerning applications for employment, the military, and the like.

The Supreme Court disagreed. Based upon the plain language of KRS 635.040, which clearly states that such adjudications are not to be deemed convictions, the Court reversed the judgment of conviction and remanded the case for a new transfer hearing. The Court noted that the first sentence of KRS 635.040 states unambiguously that "[n]o adjudication by a juvenile session of District Court shall be deemed a conviction." In addition, the Court pointed out that Kentucky case law has consistently held that a juvenile adjudication is not tantamount to a criminal conviction, but rather it is the adjudication of a status. *Manns v. Commonwealth*, Ky., 80 S.W.3d 439, 445 (2002); *Coleman v. Staples*, Ky., 446 S.W.2d 557, 560 (1969). Therefore, only convictions obtained after a juvenile has been transferred to circuit court and treated as an adult can be used to form the basis of a subsequent enhanced felony charge.

Morris Varble v. Commonwealth of Kentucky,
Ky., __ S.W.3d __ (01/22/04)
(Affirming in part, reversing in part, vacating in part, and remanding)

In November of 1999, Varble voluntarily permitted two detectives to enter his residence in Corydon, Kentucky. While there, the detectives noticed a number of empty Sudafed blister packs in an open trash can. Varble executed a written consent for further search of his residence, yard, and garage. During the search, the detectives discovered numerous items identified at trial as "chemicals, equipment, or evidence thereof, used in the manufacture, ingestion, or sale of methamphetamine." The search did not yield any coffee filters, which are commonly used in the manufacturing process. Nor did the officers find a discernible quantity of anhydrous ammonia (a methamphetamine precursor). Varble was arrested and searched. The search produced a piece of aluminum foil containing methamphetamine residue. In a statement to the detectives, Varble stated that Damon McCormick owned all of the chemicals and equipment found on his property. Varble further stated that McCormick had forced Varble to permit McCormick to manufacture the drug on Varble's property by threatening his life and that of his domestic companion, Hope Stevens. Varble was tried and convicted of manufacturing methamphetamine and possession of a controlled substance in the first degree. He was sentenced to consecutive prison terms of 15 years and five years respectively.

On appeal, Varble raised the following issues: 1) Count I of the indictment charging manufacturing methamphetamine was fatally defective; 2) the Commonwealth was improperly permitted to amend Count I of the indictment on the morning of trial; 3) he was not permitted to voir dire prospective jurors as to whether they could consider the full range of penalties for each charged offense; 4) he was denied his right to present the defense that someone else committed the offense; 5) there was insufficient evidence to convict him of manufacturing methamphetamine; 6) the jury was improperly instructed on the charge of manufacturing methamphetamine; and 7) KRS 218A.1432(1)(b) is unconstitutional.

Indictment not defective for failing to recite the statutory culpable mental states of "knowingly" and "with the intent to manufacture methamphetamine." Varble claimed that the

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indictment was defective because it did not recite the statutory culpable mental states of "knowingly" and "with intent to manufacture methamphetamine." The Supreme Court disagreed, noting that "since the adoption of the present criminal rules, our courts have consistently held that an indictment is sufficient if it fairly informs the accused of the nature of the charged offense and is not misleading." *Thomas v. Commonwealth*, Ky., 931 S.W.2d 446, 449 (1996).

The Court also found no fault with the trial court's allowing the Commonwealth to amend the indictment on the first day of trial to include an accomplice theory. The Court reasoned that the amendment did not prejudice Varble's substantial rights because he was not convicted as an accomplice under the theory of the amended indictment, but as the principle offender as charged in the original indictment. Also, the Court noted that defense counsel did not request a continuance and admitted that he had anticipated that the Commonwealth's motion would be granted and had prepared his defense accordingly.

Reversal for a new sentencing phase required because voir dire improperly limited. Varble filed a motion *in limine* to be allowed to voir dire prospective jurors as to whether they could consider the full range of penalties for each charged offense, *i.e.*, 10 to 20 years for manufacturing methamphetamine, and one to five years for possession of a controlled substance in the first degree. The trial court overruled the motion and limited defense counsel to inquiring whether each juror "could consider the full range of penalties." The Court found reversible error, stating "[d]enying [Varble] the right to inquire whether each juror could consider the full range of penalties for each charged offense erroneously denied him the right to determine whether each prospective juror was qualified to serve on the jury in his case." *Lawson v. Commonwealth*, Ky., 53 S.W.3d 534, 544 (2001). The Court further noted that because Varble did not receive the minimum sentence on either conviction, the error could not be deemed harmless. In the Court's view, a *Lawson* error pertains only to sentencing. Therefore, it does not require a new guilt phase trial under Count II (possession of a controlled substance). The error did not affect Count I (manufacturing methamphetamine) because Varble's conviction of manufacturing was reversed due to an improper guilt phase instruction.

Exclusion of McCormick's testimony proper after McCormick invoked Fifth Amendment privilege during in-chambers hearing. Varble attempted to call McCormick as a witness for the purpose of asking him whether he had visited Varble's home and whether he had told Ross Ferguson that he intended to "set up" Varble. During an in-chambers hearing, McCormick, on the advice of counsel, advised the trial judge that he would invoke his Fifth Amendment privilege with respect to those questions. The trial judge then sustained the prosecutor's motion to preclude Varble from calling McCormick as a witness and also from eliciting testimony from any other witness regarding out-of-court statements made to them by McCormick.

The Supreme Court found that prohibiting Varble from calling McCormick was "obviously correct," citing *Clayton v. Commonwealth*, Ky., 786 S.W.2d 866, 868 (1990) (impermissible to call a witness knowing that the witness will invoke Fifth Amendment privilege against self-incrimination). However, the Court noted that the Fifth Amendment privilege against self-incrimination "'protects a person only against being incriminated by his own compelled testimonial communications.'" *Doe v. United States*, 487 U.S. 201, 207, 108 S.Ct. 2341, 2345-46, 101 L.Ed.2d 184 (1988). Although Ferguson's proposed testimony was not preserved by avowal, the Court addressed whether two hearsay exceptions could apply to McCormick's statement to Ferguson that he was going to "set up" Varble because the issue would necessarily recur upon retrial. The Court ruled that the statement could be admissible under KRE 803(3) as a statement of McCormick's then-existing state of mind. However, the Court found that the statement did not rise to the level of a "statement against interest" under KRE 804(b)(3) because the statement was too ambiguous to support a conclusion that McCormick actually intended to "plant" chemicals or equipment on Varble's property.

Odor of anhydrous ammonia and filter of an unspecified nature sufficient evidence for conviction of manufacturing methamphetamine. Citing *Kotila v. Commonwealth*, Ky., 114 S.W.3d 226 (2003), Varble argued on appeal that there was insufficient evidence to convict him of manufacturing methamphetamine because the search of his premises did not reveal any quantity of anhydrous ammonia or any coffee filters. The Court disagreed. The Court reasoned that testimony that the odor of anhydrous ammonia was emanating from the two air tanks seized and that the discoloration of the brass fittings on the air tanks was likely caused by exposure to the ammonia was circumstantial evidence that Varble had possessed anhydrous ammonia in the recent past. As to the coffee filters, the Court found that because there was no testimony that *only* coffee filters can be used to manufacture methamphetamine, the finding of an unspecified filtering device was sufficient for conviction.

Improper manufacturing methamphetamine instruction requires reversal. The Court held that because Varble was convicted of manufacturing methamphetamine under an instruction that was actually an instruction on the lesser offense of possession of drug paraphernalia, his conviction must be reversed for a new trial.

KRS 218A.1432(1)(b) not "void for vagueness" or "overly broad," nor does it constitute "cruel and unusual punishment." The Court also rejected Varble's arguments that KRS 218A.1432(1)(b) (manufacturing methamphetamine) is unconstitutional because it violates the "void for vagueness" doctrine and the "overbreadth" doctrine. Also, the Court rejected Varble's claim that KRS 218A.1432(1)(b) violates the

proscription against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and Section 17 of the Kentucky Constitution.

Justice Lambert concurred in the result, but wrote separately to highlight the "desirable modification" of the holding in *Kotila v. Commonwealth*. Justice Lambert noted that the holding that "the odor of anhydrous ammonia" is sufficient circumstantial evidence to prove that "at some point in time" Varble possessed the ammonia and that an unspecified filtering device was also sufficient for conviction was a "significant departure from the bright line rule announced in *Kotila*." Justices Graves and Wintersheimer joined in the concurring opinion.

Shirley Martin v. Commonwealth of Kentucky,
Ky., __S.W.3d__ (12/18/03)
(Affirming)

In 1995, Martin was convicted of incest and sentenced to 10 years in prison. Because Martin was eligible to receive additional "good time credit" against his sentence under KRS 197.045(1)&(3), the Kentucky Department of Corrections (KDOC) calculated Martin's minimum expiration date as March 19, 2001. However, a 1994 indictment that charged Martin with additional sexual offenses remained pending, and in 1999, he pled guilty to those offenses. Pursuant to KRS 197.045(4), which the General Assembly enacted in 1998, Appellant could not receive KRS 197.045 "good time credits" against his 1999 convictions until he successfully completed the Sex Offender Treatment Program (SOTP). Martin has not met this requirement. Therefore, the KDOC performed its sentence calculations as to Martin's 1999 convictions without a "good time credit" allowance. Martin filed a petition for writ of habeas corpus in which he alleged that the KDOC had violated the Ex Post Facto Clauses of the federal and state constitutions by calculating his sentence expiration date in accordance with KRS 197.045(4). The trial court denied the petition and Court of Appeals summarily affirmed. Martin appealed to the Supreme Court.

The Supreme Court held that because Martin had no entitlement to the discretionary KRS 197.045(1) non-educational good time or KRS 197.045(3) meritorious good time credits, KRS 197.045(4)'s requirement that sex offenders successfully complete SOTP before they are eligible to earn such good time credits does not "increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30, 39 (1990). Accordingly, the KDOC did not violate federal or state ex post facto protections when it calculated the expiration date for Martin's 1999 convictions in accordance with KRS 197.045(4). ■

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***Banks v. Dretke,* —U.S.—, 2004 WL 330040 (Feb 24, 2004)**

The US Supreme Court recently held that the suppression of impeachment evidence required reversal of the conviction and death sentence:

Despite the prosecutor's pretrial promise to supply the defense with all the discovery they were entitled to, "the State withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. The State did not disclose that one of those witnesses was a paid police informant, nor did it disclose a pretrial transcript revealing that the other witness' trial testimony had been intensively coached by prosecutors and law enforcement officers.

Furthermore, the prosecution raised no red flag when the informant testified, untruthfully, that he never gave the police any statement and, indeed, had not talked to any police officer about the case until a few days before the trial. Instead of correcting the informant's false statements, the prosecutor told the jury that the witness "ha[d] been open and honest with you in every way," App. 140, and that his testimony was of the "utmost significance," *Id.*, at 146. Similarly, the prosecution allowed the other key witness to convey, untruthfully, that his testimony was entirely unrehearsed. Through direct appeal and state collateral review proceedings, the State continued to hold secret the key witnesses' links to the police and allowed their false statements to stand uncorrected.

Ultimately, through discovery and an evidentiary hearing authorized in a federal habeas corpus proceeding, the long-suppressed evidence came to light. ...When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight....

Brady, we reiterate, held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87. We set out in *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) the three components or essential elements of a *Brady* prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." 527 U.S., at 281-282. "[C]ause and prejudice" in this case "parallel two of the three components of the alleged *Brady* violation itself." *Id.*, at 282.Corresponding to the second *Brady* component (evidence suppressed by the State), a petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the compass of the "cause and prejudice" requirement exists when the suppressed evidence is "material" for *Brady* purposes. 527 U.S., at 282. As to the first *Brady* component (evidence favorable to the accused), beyond genuine debate, the suppressed evidence relevant here, Farr's paid informant status, qualifies as evidence advantageous to Banks. See App. to Pet. for Cert. A26 (Court of Appeals' recognition that "Farr's being a paid informant would certainly be favorable to Banks in attacking Farr's testimony"). ■

6TH CIRCUIT CASE REVIEW

Emily Holt

Caver v. Straub
349 F.3d 340 (6th Cir. 11/19/03)

Writ of habeas corpus granted where appellate counsel failed to raise issue that trial counsel was absent during jury re-instruction. In this case, the 6th Circuit affirms the district court's granting of Caver's petition for writ of habeas corpus. The district court found that Caver's appellate counsel was ineffective in failing to raise the ineffectiveness of Caver's trial counsel on direct appeal, thus establishing a separate constitutional defect and cause and prejudice sufficient to excuse the procedural default of Caver's ineffective assistance of trial counsel claim.

State argument that claim is procedurally defaulted not reviewed when it is raised for first time before 6th Circuit. The Court will not consider the state's argument that Caver's ineffective assistance of appellate counsel claim is procedurally defaulted because the state never raised this issue until it appeared before the present court. Issues "raised for the first time on appeal are not properly before the court." *J.C. Wyckoff & Assoc., Inc., v. Standard Fire Insurance Company*, 936 F.2d 1474, 1488 (6th Cir. 1991).

***Pro se* litigants subject to "less stringent" standards on habeas review.** Caver did not procedurally default his ineffective assistance of trial counsel claim. The only time Caver presented his claim to the state courts was in a *pro se* motion for relief from judgment filed in the trial court and, when that was denied, motions for leave to appeal filed in the Michigan appellate courts. "Given the less stringent standards and active interpretation that are afforded to the filings of *pro se* litigants. . . Caver 'fairly presented' the trial counsel ineffectiveness claim."

***Strickland* standard when appellate counsel failed to raise an issue is whether issue not raised "was clearly stronger" than issues raised.** Under the AEDPA, for Caver to prevail on federal habeas review of an ineffective assistance of counsel claim, he must meet the *Strickland v. Washington*, 466 U.S. 668 (1984), test, and "he must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 698-99 (2002).

"In relation to appellate counsel, the *Strickland* performance standard does not require an attorney to raise every nonfrivolous issue on appeal. . . Indeed, the process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail ... is the hallmark of effective appellate advocacy." (citations omitted) A petitioner must prove that the issue not presented "was clearly stronger than the issues that counsel did present." *Smith v. Robbins*, 528 U.S. 259, 289 (2002). In the case at bar, the omitted issue, which involved whether counsel was ineffective for being absent during jury re-instruction, was much stronger than claims presented on appeal, which included one involving a jury instruction subject to "plain error" review and another that was a sufficiency of the evidence issue, both of which would be extremely difficult to win on direct appeal.

"Result would have been different" on direct appeal because trial counsel absent during jury re-instruction, a critical stage of proceedings under *Cronic*. Furthermore, appellate counsel's performance in failing to include this issue on direct appeal prejudiced Caver "because but for the appellate counsel's ineffectiveness, there is a reasonable probability that the result of the state appeal may have been different." This is because under *U.S. v. Cronic*, 466 U.S. 648, 659 & n.26 (1984), when counsel is absent during a critical stage of a criminal proceeding, prejudice is presumed. The 6th Circuit recently determined jury re-instructions was a critical state in *French v. Jones*, 332 F.3d 430 (6th Cir. 2003). Thus prejudice is presumed. [But see 6th Circuit opinion below in *Hudson v. Jones*, 351 F.3d 212 (6th Cir. 12/3/03)]

Finally, the Court rejects the state's argument that the record does not support a finding that trial counsel was absent during jury re-instruction. The trial transcript indicates that when the trial court received a question from the jury during deliberations, the judge asked, "Where is Mr. Simon [Caver's trial counsel]?" An attorney for a co-defendant then stated, "I just asked the same question." There is nothing to indicate Mr. Simon ever returned to the courtroom. It is reasonable to assume that he did not.

Judge Rogers concurrence: jury re-instruction not always a "critical stage." Judge Rogers concurs in the result, but writes to express that he believes there may be cases where jury re-instruction is not a "critical stage" under *Cronic*. [*See Hudson v. Jones*, 351 F.3d 212 (6th Cir. 12/3/03) below]

Newton v. Million
349 F.3d 873 (6th Cir. 11/17/03)

Granting of writ reversed in Kentucky case where trial court refused to give multiple aggressors defense jury instruction. Newton was convicted in Kentucky state court of murder and sentenced to 40 years. He got into a fight and fatally stabbed a man. At trial he testified that he thought the victim was armed and that had to protect himself against 2 aggressors when a friend of the victim joined in the fray. The trial court did instruct on self-protection but refused to instruct

the jury concerning the defense against multiple aggressors. The Kentucky Supreme Court affirmed the trial court's decision not to instruct on multiple aggressors defense although it did note that the second man kicked Newton twice during the fight. On habeas review, the federal district court granted Newton's writ, holding Newton was entitled to the multiple aggressors defense and that the Kentucky Supreme Court's factual findings were not supported by the record. The 6th Circuit reverses the grant of the writ.

Issue "fairly presented" to state appellate court where relevant federal constitutional amendments cited. The jury instruction issue was "fairly presented" to the Kentucky Supreme Court so it is not procedurally defaulted. It was sufficient that in his brief Newton stated that failure to instruct on the multiple aggressors defense "violated his right to due process of law under the 5th and 14th Amendments" of the U.S. Constitution. "There is no requirement that the petitioner cite to cases that employ federal constitutional analysis where he has phrased his claim in terms of a denial of a specific constitutional right." Furthermore, "the fact that the Supreme Court of Kentucky neglected Newton's federal claim does not deprive this court of jurisdiction."

Defendant's right to present a defense does not include the right "to a specific jury instruction." The Court denies the merits of Newton's claim because he was not deprived of a jury instruction on self-defense; rather the trial court refused only to add the second aggressor's name. There are "no Supreme Court case[s] which hold that a criminal defendant's right to present a defense includes the right to a specific jury instruction, particularly one that goes beyond a general affirmative defense. . . The nature of the particular instruction given is a matter of state law…."

Judge Cole dissent: defense was denied by the giving of the general self-protection instruction without the multiple aggressors instruction. Judge Cole dissents. "[C]ontrary to the majority's assertions, the problem was not that the instruction to the jury was too general—the problem was that it was too specific." The instruction only permitted the jury to find Newton was privileged to act in self-defense if he believed it was necessary to defend himself against the victim. A general instruction—"the defendant has a right to protect himself against the threat of physical force"—would have avoided this problem. "As a result of [the given] instruction, a jury could have found that Newton was reasonable defending himself against multiple attackers yet still felt compelled to convict Newton of murder."

Hudson v. Jones
351 F.3d 212 (6th Cir. 12/3/03)

Court reaches different result than in *Caver v. Straub, supra:* jury re-instruction not "critical stage" of proceedings. Hudson was convicted in Michigan state court of murder and being a felon in the possession of a firearm. On federal habeas review the district court granted a conditional writ of habeas corpus on the ground Hudson's trial counsel was ineffective when he was absent from court when the judge reread selected portions of the instructions to the jury. The district court reasoned Hudson's counsel was absent at a critical stage of the proceedings so prejudice should be presumed. *U.S. v. Cronic*, 466 U.S. 648 (1984). The 6th Circuit reverses the granting of the conditional writ.

After the jury was sent to deliberate, the trial court, prosecutor, and Hudson's defense attorney, Young, discussed on the record what the procedure would be if the jury asked to be re-instructed as Young had to be in a different court. Young stated he would have no objection to the trial court re-instructing the jury in his absence. He indicated he would be in constant comment with the court should anything extraordinary arise. During deliberations, the jury requested that it be given the definition of aiding and abetting and the difference between first and second-degree murder. Neither Hudson, Young, nor the prosecutor were present when the trial court reread to the jury the pertinent sections of the instructions. The trial court had, in its original instructions, given a short definition of aiding and abetting as related to the murder charge and had given a fuller definition of aiding and abetting as related to the felon in possession of a firearm charge. The trial court reread the fuller aiding and abetting instruction for the jury. No other discussion took place. The next day Hudson was convicted of first-degree murder and being a felon in possession of a firearm.

Re-instruction of jury not critical stage because instructions merely reread. Young was not absent during a critical stage of the proceedings so prejudice cannot be presumed. In the case at bar the trial court merely *reread* the jury instructions; it did not, as in *French v. Jones*, 332 F.3d 430 (6th Cir. 2003), give a supplemental instruction (which was distinct from the standard instruction) to a thrice-deadlocked jury. In the case at bar, the instructions reread had been given verbatim in Young's presence during the initial charge. The only difference was that in the initial charge other instructions were interspersed between the murder instruction and the full aiding and abetting instruction. The Court finds this difference immaterial. In so doing, it follows the 1st and 3rd Circuits. *Curtis v. Duval*, 124 F.3d 1 (1st Cir. 1997); *U.S. v. Toliver*, 330 F.3d 607 (3rd Cir. 2003).

Judge Moore dissent. Judge Moore dissents. "I respectfully dissent from the majority opinion because I believe that the absence of counsel during as critical a stage of the trial as jury instruction or jury re-instruction presumptively prejudices the defendant by sharply undermining the reliability of the resulting trial. . . The absence of counsel, even when the previously issued instructions are reread verbatim, impinges the validity of the trial because the defendant, rarely knowledgeable in the technical interstices of basic law, let alone the tangle of jury instruction, cannot respond without the help of counsel to whatever confusion, problem, or ambiguity sparks the jury to return to the court for advice."

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Willis v. Smith
351 F.3d 741 (6th Cir. 12/16/03)

Willis was convicted of conspiring to distribute 650 grams or more of cocaine and was sentenced to life imprisonment in Michigan state court. On habeas review he argued his trial attorney was ineffective when he advised Willis to have a bench trial before a judge who, when presiding over Willis' brother's (and his co-defendant's) trial said, "I agree with some of what defense counsel's theory is going to be—that Barry [the petitioner] is the big guy—may be the big guy. It sure looks like it from talking to these witnesses." He further asserted that appellate counsel was ineffective by failing to challenge his trial attorney's effectiveness in his direct appeal. The Court holds Willis procedurally defaulted his ineffective assistance of trial counsel claim and his ineffective assistance of appellate counsel claim has no merit.

Claim procedurally defaulted where petitioner failed to include it in direct appeal as required by state rule of procedure. As to the procedural default, under Michigan Court Rule 6.508(D)(3) Willis had to include his ineffective assistance of trial counsel claim in his appeal as of right; this he failed to do. Because the Michigan appellate courts enforced this procedural rule in Willis' case, and this was an "adequate and independent"—one that was "firmly established and regularly followed" at the time of application—state ground foreclosing federal habeas review, the ineffective assistance of trial counsel claim was procedurally defaulted. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).

Appellate counsel ineffectiveness cannot serve as cause of procedural default where issue petitioner alleges should have been included in direct appeal has no merit. Willis asserted that his appellate counsel's ineffectiveness was cause of the default so as to excuse the procedural default of the ineffective assistance of trial counsel claim. *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir.), *cert.denied*, 532 U.S. 989 (2001). For appellate counsel's ineffectiveness to serve as cause, counsel's representation must meet the *Strickland v. Washington*, 466 U.S. 668, 688 (1984), standard. Furthermore, "appellate counsel cannot be ineffective for a failure to raise an issue that lacks merit." *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001). Because Willis' ineffective assistance of trial counsel claim lacks merit, appellate counsel was not ineffective so there is no cause for Willis' procedural default.

Fact that judge presiding over bench trial has prior knowledge of case and has expressed opinions about defendant's guilt does not alone establish bias. Willis' claim of ineffective assistance of trial counsel has no merit because the trial court's comments do not reveal a preconceived notion of Willis' guilt such that it was objectively unreasonable for Willis' counsel to recommend a bench trial. "Opinions held by judges as a result of what they learned in earlier proceedings" cannot alone establish "bias" or "prejudice." *Liteky v. U.S.*, 510 U.S. 540, 551 (1994). Furthermore, prior to the start of Willis' trial, the trial court engaged in a lengthy colloquy with Willis about his prior comments and, on the record, Willis indicated he wished to proceed with a bench trial. Finally, even if trial counsel's performance was unreasonable, there is no proof "the result of the proceeding would have been different." There was overwhelming evidence of Willis' guilt.

Lopez v. Wilson
2004 WL 65135 (6th Cir. 1/15/04)

Petitioner not entitled to appointed counsel for purpose of moving to reopen direct appeal so as to allege ineffective assistance of counsel in state court. Under Rule 26(B) of the Ohio Rules of Appellate Procedure, an Ohio defendant wishing to raise an ineffective assistance of appellate counsel claim must file an application to reopen in the state court of appeals where the appeal was decided rather than in the trial court. In *White v. Schotten*, 201 F.3d 743 (6th Cir.), *cert. denied*, 531 U.S. 940 (2000), the 6th Circuit held that a Rule 26(B) application was part of the direct appeal. Thus, a defendant is constitutionally entitled to counsel during this process. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Lopez claims on federal habeas review that because his request for appointment of counsel to assist in filing a Rule 26(B) motion was denied, his constitutional rights were violated under *White*. The district court denied Lopez's petition for writ of habeas corpus, and the 6th Circuit affirms. *White* predated AEDPA, which is applicable in the instant case, and under AEDPA, the state court's decision was not contrary to clearly established federal law.

If a state provides an appeal as of right, the state must provide counsel for indigent defendants. Further said defendant has a right to effective assistance of counsel on the appeal. *Evitts*, 469 U.S. at 393-394. The question is whether an application to reopen a first appeal as of right is part of the appellate process. In *Douglas v. California*, 372 U.S. 353, 356 (1963), the Supreme Court in again holding counsel was required in an appeal as of right, stated "We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal, granted as a matter of right to rich and poor alike from a criminal conviction." A 26(B) motion is "somewhere beyond the state in the appellate process at which the claims have once been presented by a lawyer and passed upon by the appellate court." *Douglas*, 372 U.S. at 356. While a Rule 26(B) motion is part of the direct appeal process as far as determining the statute of limitations under AEDPA, *Bronaugh v. Ohio*, 235 F.3d 280 (6th Cir. 2000), it is not so much a part of the process so as to require the state to appoint counsel.

Robinson v. Stegall
2004 WL 98688 (6th Cir. 1/22/04)

Writ of habeas corpus cannot be granted if district court has not found a petitioner's constitutional right has been vio-

lated. Robinson was convicted in Michigan state court of kidnapping. After exhausting his claims in state court, he filed a petition for writ of habeas corpus in federal district court alleging ineffective assistance of counsel and that his counsel had a conflict of interest in that an associate in his attorney's law firm represented a co-defendant. While the magistrate recommended the petition be denied, the parties entered into a consent judgement that stated "IT IS HEREBY ORDERED that the petition for writ of habeas corpus is conditionally granted. Unless the state takes action to afford Petitioner a full hearing in the trial court to determine whether Petitioner was denied the effective assistance of counsel or his counsel had a conflict of interest within ninety (90) days of the date of this Order, the Court shall issue the writ ordering the Respondent to vacate the sentence and conviction. This hearing is to be conducted as part of the Petitioner's appeal of right."

A hearing was held in the state trial court, and the judge denied Robinson's claim. While appellate counsel was appointed, the Michigan Court of Appeals dismissed the case for lack of jurisdiction under the Michigan Court Rules. Specifically, the Court refused to hear the case as part of Robinson's appeal as of right. The federal district court issued a show cause order to the Michigan appellate courts. The district court ultimately entered an order enforcing its consent judgment and granting a conditional writ of habeas corpus stating that if not retried within 90 days the writ would be granted.

The granting of a conditional writ was premature. Specifically the Court holds that because the district court has not yet found a violation of Robinson's 6th Amendment rights, a writ cannot be granted. 28 USC §2254(a). The case is remanded to the federal district court for an evaluation of Robinson's constitutional claim in light of the decision reached by the Michigan courts.

McFarland v. Yukins
2004 WL 103013 (6th Cir. 1/23/04)

Writ granted where trial counsel represented mother and daughter co-defendants. The 6th Circuit affirms the grant of a conditional writ of habeas corpus to McFarland on the ground that her attorney, Daggs, labored under a conflict of interest as he represented her daughter at trial as well. Both McFarland and Reeves, her daughter, were charged with various drug offenses arising from a search of a house they shared. At the preliminary hearing the women told the trial court they both wanted to be represented by Daggs. On the morning of trial however McFarland and Reeves expressed concern about the dual representation. The court was concerned that the women had waited until the morning of trial to convey their doubt but ultimately severed their trials, and ordered Daggs to represent each woman in a bench trial in front of different judges. Both women were convicted.

For appellate ineffectiveness to serve as cause for procedural default petitioner must demonstrate reasonable probability that inclusion of issue would have changed the result of the appeal. The state first argued that McFarland was not entitled to raise trial counsel's ineffectiveness on federal habeas because she did not raise the claim on direct appeal as required by Michigan state rules. McFarland argues that her claim of ineffective assistance of trial counsel is so strong that appellate counsel's failure to raise it shows she received ineffective assistance of appellate counsel. This would serve as cause to excuse her procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). In order for appellate ineffectiveness to serve as cause, the test elucidated in *Strickland v. Washington*, 466 U.S. 668 (1984), must be met. In the context of appellate representation this means there must be a reasonable probability that inclusion of the issue would have changed the result of the appeal. *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001), *cert. denied*, 535 U.S. 940 (2002).

***Holloway* would have mandated automatic reversal since McFarland voiced a timely objection to joint representation and trial court failed to obviate the problem.** The Court notes that when McFarland appealed her conviction in 1988-89, there were 3 routes to establishing that trial counsel provided ineffective assistance so as to violate her 6th Amendment right to counsel. The first question, thus, is whether there is a reasonable probability that McFarland would have won her appeal under any of these 3 theories.

Under the rule of *Holloway v. Arkansas*, 435 U.S. 475 (1978), when a defendant or her counsel timely objects to joint representation of clients with antagonistic defenses and the trial court fails to investigate the conflict, a defendant is entitled to an automatic reversal; prejudice is presumed. McFarland's case falls under the *Holloway* rule because Daggs was representing co-defendants joined for trial, and it was obligatory for the trial court to conduct an investigation, especially in light of the fact that McFarland made a timely objection to having to share an attorney with her daughter. "A mother and daughter were charged with possession of drugs found in the house where both were living. They indicated that they would defend themselves on the theory that 'someone else' owned the drugs and that they did not want to be represented by the same lawyer at trial. This is clear notice to the court of a concrete conflict of interest, sufficient to bring the case within the *Holloway* rule." Finally, the trial court did not obviate the conflict by severing the trial. While providing separate trial may reduce the potential for conflict of interest from joint representation, *Burger v. Kemp*, 483 U.S. 776, 784 (1987), in the case at bar it did not as Daggs was still actively involved in Reeve's trial, which began on April 5-6, when he tried McFarland's case (trial began April 7). Both trials were continued until April 11, due to the unavailability of a witness. That witness testified in both trials on April 11, which was when Reeves' trial concluded. McFarland's trial concluded on April 21. "[A]ny evidence or argumentation he developed against Reeves would instantly be made available

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to the prosecutor for use in McFarland's case." Furthermore, "had Daggs attempted to exonerate McFarland by showing that Reeves controlled the southeast bedroom [where drugs were found], he would have compromised his duty to Reeves." If appellate counsel had raised the issue of trial counsel's conflict of interest on direct appeal, McFarland's conviction would have been reversed under *Holloway*.

***Sullivan* would also require reversal since, because of the conflict of interest, trial counsel chose to avoid raising a strong defense for petitioner.** Under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), when an attorney's representation of multiple defendants, though not objected to at trial, results in an actual conflict of interest adversely affecting the attorney's performance, the defendants' 6th Amendment rights have been violated, even without a showing that the conflict would have caused the defendant to lose his or her case. In *Mickens v. Taylor*, 535 U.S. 162, 172, n. 5 (2002), the U.S. Supreme Court stated, "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." The standard requires a choice by counsel caused by the conflict of interest. "[W]here counsel fails to pursue a strong and obvious defense, when pursuit of that defense would have inculpated counsel's other client, and where there is no countervailing benefit to the defendant from foregoing that defense or other explanation for counsel's conduct, these facts amount to evidence of disloyalty under any interpretation of *Sullivan*." In the case at bar, McFarland's best defense would have been to allege the drugs belonged not to her but to Reeves. There was strong evidence that the drugs were controlled by Reeves, not by McFarland. Unfortunately in McFarland's case, Daggs actually argued Reeves was innocent. "The burden of exculpating Reeves during McFarland's trial caused Daggs to make implausible arguments that would not have been necessary had he been defending McFarland alone." The Court concludes that Daggs made an actual choice to forego an obvious and strong defense to avoid inculpating Reeves. He labored under an actual conflict of interest that violated the 6th Amendment under *Sullivan*.

Reversal would also be probable under *Strickland* since if the defense that McFarland's daughter possessed the drugs had been raised, McFarland would have been found not guilty. The Court further holds, by reference to its *Holloway* and *Sullivan* discussions, that if state appellate counsel had argued ineffective assistance of counsel under *Strickland v. Washington*, *supra*, McFarland would have prevailed on direct appeal. Specifically, the Court points to the fact there was strong evidence to suggest Reeves possessed the drugs, and McFarland's judge noted on the record that she almost found McFarland not guilty.

Appellate counsel's failure to include issue on direct appeal violated right to counsel since McFarland would have most certainly have gotten an automatic reversal. Finally, the 6th Circuit turns to the question of whether appellate counsel's failure to raise the argument was sufficiently unreasonable to violate her right to counsel. While failure of appellate counsel to raise an issue can be constitutionally ineffective, "counsel has no obligation to raise every possible claim, and the decision of which among the possible claims to pursue is ordinarily entrusted to counsel's professional judgment. 'Counsel's performance is strongly presumed to be effective.' Even if counsel made a mistake, the mistake might not be serious enough to have affected the defendant's constitutional right to counsel." (citations omitted)

The Court lists 11 factors to be considered when determining whether appellate counsel was ineffective or when counsel's decision to omit an argument on appeal falls within the realm of acceptable professional performance: (1) Were the omitted issues "significant and obvious?;" (2) Was there arguably contrary authority on the omitted issues?; (3) Were the omitted issues clearly stronger than those presented?; (4) Were the omitted issues objected to at trial?; (5) Were the trial court's rulings subject to deference on appeal?; (6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?; (7) What was appellate counsel's level of experience and expertise?; (8) Did the petitioner and appellate counsel meet and go over possible issues?; (9) Is there evidence that counsel reviewed all the facts?; (10) Were the omitted issues dealt with in other assignments of error?; and (11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt? *See Mapes v. Coyle*, 171 F.3d 408, 427-8 (6th Cir. 1999).

In analyzing this case under the factors, the Court notes that as it has determined that McFarland received an ineffective assistance of trial which should have resulted in reversal of her conviction, it is obvious that this argument was stronger than the 7 arguments actually raised on direct appeal. Further, the conflict interest was obvious. Finally appellate counsel represented both McFarland and Reeves on appeal. "It would have been difficult, if not impossible, for appellate counsel to argue that trial counsel's conflict prevented trial counsel from pointing the finger at Reeves when appellate counsel was also representing Reeves on appeal. This spectre of yet another conflict of interest contributes to McFarland's showing of ineffective assistance of appellate counsel." The Court concludes appellate counsel ineffectiveness was cause for McFarland's failure to raise ineffective assistance of trial counsel on appeal. The ineffectiveness claim was meritorious and would have resulted in automatic reversal of her conviction. McFarland has shown cause and prejudice excusing her failure to raise ineffective assistance of trial counsel on direct appeal. ■

Emily Holt
Assistant Public Advocate

CAPITAL CASE REVIEW

Susan Balliet

U.S. SUPREME COURT

***Mitchell v. Esparza*, 124 S.Ct. 7 (2003)**

PER CURIAM

Esparza's counsel failed to insist on compliance with Ohio's death penalty statute, which required Esparza to be named as a principal offender in the indictment to support a death sentence. Esparza was convicted of aggravated robbery and aggravated murder, and sentenced to death. Nonetheless, the Ohio Court of Appeals upheld Esparza's conviction. A federal district court overturned it, holding that the state court had unreasonably applied clearly established federal law, to wit: *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Sullivan v. Louisiana*, 508 U.S. 275 (1993). The 6th Circuit affirmed the district court, holding that the 8th Amendment precluded Esparza's death sentence, and that harmless error review was inappropriate. Here, the U.S. Supreme Court reverses the 6th Circuit.

No need to cite U.S. Supreme Court opinions. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may grant a state habeas petitioner relief for a claim that was adjudicated on the merits in state court if that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The 6th Circuit failed to cite this controlling law.

Held: a state court decision is not contrary to clearly established federal law simply because it does not cite a U.S. Supreme Court opinion. *Early v. Packer*, 537 U.S. 3, 8 (2002).

Harmless error review is appropriate for failure to instruct on an element. The 6th Circuit held that failure to charge Esparza as a principal in the indictment was tantamount to dispensing with the reasonable doubt requirement in *Sullivan*. However, dispensing with reasonable doubt in *Sullivan* affected all the jury's findings, whereas, a failure to instruct on one element does not. *Neder v. United States*, 527 U.S. 1, 19 (1999), etc. Here, harmless error review is feasible.

This is true in capital cases. It makes no difference that Esparza's is a capital case.

Federal courts may not lightly overrule state courts. By relying on a lack of precedent to distinguish non-capital cases, and holding that harmless error review is not available for this type of 8th Amendment claim, the 6th Circuit exceeded its authority under 2254(d)(1). When U.S. Supreme Court precedent is lacking, or ambiguous, a federal court may not overrule a state court simply for holding a different view than its own.

The state court must be more than incorrect. It must be unreasonable. If a state court errs in concluding the state's errors were harmless, that is not enough. Habeas relief is appropriate only if the state court "applied harmless error review in an objectively unreasonable manner." The decision must be more than just incorrect. It must be unreasonable.

Upholding Esparza's conviction was not unreasonable. Esparza was tried solo, and no question was raised whether he might not have acted alone (until his case reached federal district court). Omitting the "principal" language from the indictment made no difference. The verdict would have been the same if the jury had been instructed to find Esparza was the principal.

SIXTH CIRCUIT COURT OF APPEALS

***Dennis v. Mitchell*, 2003 WL 23024775**
(6th Cir., Ohio) (Decided December 29, 2003)

Majority: Suhrheinrich (writing), Siler, Daughtrey

In this AEDPA case, Adremy Dennis, a young African-American male, claimed he was drunk when he shot and killed a robbery victim by accident. He was convicted of attempted aggravated murder, aggravated murder, and aggravated robbery, and sentenced to death. The district court dismissed his habeas petition, and denied certificate of appealability (COA). The 6th Circuit granted COA on six jury issues, but here affirms the district court's dismissal.

Juror failed to disclose she was crime victim. When it came to light during penalty phase deliberations that a juror had failed to disclose she was a victim of child sex abuse, she explained she didn't understand sex abuse qualified as "violent," and asserted impartiality. Defense counsel did not object, did not question her, but moved for mistrial after the death sentence.

The trial court's failure to exclude this juror was not an unreasonable application of clearly established U.S. Supreme Court precedent. *See McDonaugh Power Equipment, Inc., v. Greenwood*, 464 U.S. 548 (1984) (was non-disclosure intentional, dishonest?)[1]; and *Patton v. Yount*, 467 U.S. 1025, 1036 (1984) (trial court determination of juror credibility entitled to "special deference." —relevant question is "did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed.")

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Jurors with negative views of the death penalty. Two prospective jurors expressed problems with imposing the death penalty. One stated that she would "have a lot of trouble" imposing death, even if the court instructed the jury to consider it. And the other stated that "[i]t will be a big problem for me to sign and say that…I believe this person should be given the death penalty." Unfortunately, it appears that was not all the jurors said. Overall, it appears the record supported the trial court's decision that each of these jurors had an inability or unwillingness to follow the law. "[W]here the trial court is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law, deference must be given to the trial judge who sees and hears the prospective juror."

The Ohio Supreme Court's opinion is not an unreasonable application of *Wainwright v. Witt*, 469 U.S. 412 (1985) (standard is whether the juror's views would prevent or substantially impair the performance of his duties). Nor is it contrary to *Adams v. Texas*, 448 U.S. 38 (1980) (improper to exclude jurors whose views might "affect" their deliberations); or *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (improper to exclude jurors who voice general, conscientious, or religious objections to the death penalty).

Questioning on specific mitigating factors –not allowed. It was not an abuse of discretion to disallow specific questions on Dennis's age, lack of prior criminal history, and environment. The trial court allowed adequate, detailed questioning to expose any faults that would render a juror ineligible. This was not an unreasonable application of (or contrary to): 1) *Morgan v. Illinois*, 504 U.S. 719 (1992) (no right to catechism on voir dire, only right is to an impartial jury); 2) *Mu' Min v. Virginia*, 500 U.S. 415 (1991) (failure to allow helpful questions on specific content of news articles did not render trial fundamentally unfair); or 3) *Ristaino v. Ross*, 424 U.S. 589 (1976) (fact defendant is black and victim white is not enough to require voir dire on racial bias).

Peremptory challenges. It was okay to exclude two African-Americans by peremptory challenge. Both expressed religious opposition to the death penalty. One had a cousin who had been murdered, and a son convicted of a serious crime. The other was consistently late, and confused regarding judicial procedures. Cf. *Holland v. Illinois*, 493 U.S. 474 (1990) (okay to exclude cognizable groups, so long as not based on immutable characteristics like race, sex); and *Batson v. Kentucky*, 476 U.S. 79 (1986) (requiring race-neutral explanation); and *Hernandez v. New York*, 500 U.S. 352 (1991) (defendant has burden to prove purposeful discrimination).

Ineffective assistance of counsel. There was none, despite the fact there was no challenge to removal of the two jurors for cause, or to use of peremptory challenges to remove the others.

***Hamblin v. Mitchell*, 2003 WL 23024784**
(6th Cir., Ohio) (Decided December 29, 2003)

Majority: Merritt (writing), Gilman
Minority: Batchelder dissenting

In this pre-AEDPA case, David Hamblin was convicted *inter alia* of aggravated murder and aggravated robbery. The primary issue was whether counsel provided an adequate defense under the 6th Amendment as incorporated in the Due Process Clause. Here the 6th Circuit reverses the district court, and grants a new sentencing trial.

6th Circuit affirms *Wiggins* holding that ABA standards "rule." The 6th Circuit endorses last year's holding in *Wiggins v. Smith*, — U.S. —, 123 S.Ct. 2527 (2003), that the American Bar Association standards for counsel in death penalty cases define the "prevailing professional norms" in ineffective assistance cases.

In *Strickland v. Washington*, 466 U.S. 668 (1984) the Court stated that counsel must be "guided" by "American Bar Association standards and the like." However, the *Strickland* Court also said that judicial scrutiny of counsel's performance must be "highly deferential," and that the defendant must overcome a strong presumption that counsel's action is reasonable because any "detailed guidelines … would encourage the proliferation of ineffectiveness challenges." *Wiggins* –according to the *Hamblin* Court—"adds clarity, detail and content to the more generalized and indefinite 20-year-old language of *Strickland*."

With pride, the *Hamblin* Court points to 6th Circuit decisions since 1995 recognizing and applying the ABA guidelines prior to *Wiggins*. (*i.e.*, *Glenn v. Tate*, 71 F.3d 1204, 1206-08 (6th Cir. 1995) (setting aside death sentence for ineffectiveness in the penalty phase, and holding that counsel must *–prior to the guilt phase—* investigate the defendant's history, background, and organic brain damage); *Austin v. Bell*, 126 F.3d 843, 847-48 (6th Cir. 1997); and *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001) (relying on 1989 ABA Guidelines).

Thus the *Hamblin* Court holds that Hamblin's representation fell "far short of prevailing standards of effective assistance of counsel as outlined in *Wiggins*, our previous cases and the 1989 and 2003 ABA Guidelines."

ABA Guidelines are now mandatory reading for defense counsel. Hamblin was tried before the 1989 ABA edition of the standards was published. Yet the 6th Circuit applies the 1989 and 2003 ABA standards in *Hamblin*, because "the standards merely represent a codification of longstanding, common-sense principles of representation…." Under *Wiggins* and *Hamblin*, trial counsel should now consider current ABA guidelines mandatory reading for all capital cases. And post conviction counsel will need to consult guidelines in effect at the time of the trial, no matter how long ago. Under *Hamblin* any case tried in the 80s should

be covered by the 1989 ABA Guidelines. For cases tried in the 60s or 70s, one can still argue under *Hamblin* that the 1989 and 2003 ABA guidelines apply. One could also consult the old National Legal Aid and Defender Association guidelines, which pre-date and foreshadow the ABA guidelines.

There is no good reason to omit a mitigation investigation. The district court found the lack of mitigation investigation was "strategic," because Hamblin's counsel relied on "residual doubt" in the sentencing phase. The 6th Circuit finds this strategy "makes no sense," given that a jury had just found Hamblin guilty *beyond* a reasonable doubt. Counsel's other reason for not investigating –that he feared the investigation would uncover harmful information—is also criticized for making no sense.

Finally, the Court rules that it is no excuse that Hamblin may have told his counsel not to investigate mitigation. Counsel "cannot responsibly advise a client about the merits or different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation…. —ABA Guidelines, §10.7 (2003) at pp. 80-81.

A potential dark side of *Hamblin*. It should be noted that the defense attorney in *Hamblin* –who was disbarred and died long before the 6th Circuit criticized him—had never tried a capital case before and did absolutely nothing to prepare for his client's sentencing trial. Also, Hamblin's post conviction counsel discovered and presented a ton of mitigation evidence. The Court is careful to list absolutely everything Hamblin's counsel did wrong, and every speck of the mountain of mitigation presented by post conviction counsel –all of which later panels can now use to distinguish your case from Hamblin's.

It should also not be overlooked that there were other issues in *Hamblin* in addition to the ineffectiveness for lack of a mitigation investigation. As to each and every one of these other issues, the *Hamblin* Court rules against Hamblin.

No IAC for failure to put on an expert pathologist. The coroner testified that the victim died from one or more blows to the head. Post conviction counsel claimed an expert pathologist could have shown that death resulted from a single blow. This claim fails, however, because post conviction counsel failed to produce an expert pathologist to in fact clarify the issue. Absent that evidence, the 6th Circuit "cannot say" this failure was harmful to Hamblin.

No IAC for failure to put on electrophoresis expert. Post conviction counsel claimed IAC for failure to have an expert testify that electrophoresis is unreliable, especially when performed on post mortem blood samples. This error was harmless, because in addition to the match identifying the victim's blood on a jacket in Hamblin's home, there was a wealth of other physical evidence of the defendant's guilt.

No prosecutorial misconduct/ no *Brady* violation. The Court acknowledges that the prosecutor's repeated references to the numerous blows received by the victim were not supported by the evidence and were prejudicial. However, the trial court admonished the jury shortly after the prosecutor's comments to look only to the evidence, not the comments of the lawyers.

The state withheld and lost evidence of negative gunshot residue test results on the defendant's clothes. This evidence might have cast doubt on whether the defendant shot a park ranger in the leg in a separate, related incident just prior to the murder. Though the state was at fault for failing to turn over the results, this evidence would not have had an impact on guilt/innocence.

Playing defendant's taped statements at trial was harmless. Hamblin claimed he was not *Mirandized* when he gave statements containing mostly irrelevant and/or inadmissible ramblings about himself, including information on prior crimes and vulgar language expressing hatred of homosexuals. Much of the info on the tapes was cumulative of evidence properly admitted. So the tapes were harmless.

Batchelder's dissent. Batchelder would not grant the writ, because even though Hamblin's counsel was ineffective, Batchelder believes the jury would have given him the death penalty anyway. Hamblin is not like the defendant in *Wiggins* because Hamblin was never sexually abused, and he had a violent criminal history. He was unlike the petitioner in *Glenn, supra*, because he can't point to any medical opinion establishing neurological impairment or global brain damage, or mental retardation.

Endnote:

1. The *Dennis* Court reminds us —pointing to a footnote in an unpublished opinion, *Baker v. Craven*, 82 Fed.Appx 423 (6th Cir. 2003)—that dishonesty is not the only test for challenging a juror. The footnote in *Baker* reads as follows: "The *McDonough* test "is not the exclusive test for determining whether a new trial is warranted: a showing that a juror was actually biased, regardless of whether the juror was truthful or deceitful, can also entitle a defendant to a new trial." *Jones v. Cooper*, 311 F.3d 306, 310 (4th Cir.2002) (citation omitted); see also *McMeans v. Brigano*, 228 F.3d 674, 686 (6th Cir.2000); *Gonzales v. Thomas*, 99 F.3d 978, 985-6 (10th Cir.1996)." ■

Susan Jackson Balliet
Supervisor, Capital Post Conviction

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The Captain's Quarters is a very nice facility on the Ohio River in eastern Louisville/ Jefferson County, with a restaurant, bar, boat docks and a great view of downtown Louisville on the river.

The Content, Format and Agenda are as Follows:

I. The Professional Responsibility of Criminal Defense Lawyers in Representing the Wrongfully Convicted: The Lessons of the William Gregory Case , Presenter: Larry D. Simon, Esq. (20 minutes)

II. Ethical Issues for the Honest Defense Lawyer: Coping with the Realities of Modern Day Criminal Practice Presenter: Frank Mascagni, III, Esq. (20 minutes)

III. Winding Your Way Through the Bar Disciplinary Process: How to Properly Respond to a Bar Complaint Presenter: Benjamin Cowgill, Esq. (20 Minutes)

One (1) Hour of CLE Credit (Ethics) for Kentucky is Pending. If anyone would like CLE Credit for another state, please contact me.

I would like to invite everyone to attend. If everyone that was planning on attending would invite one other person, we could start this year off on a very positive note for KACDL.

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IMPORTANT REMINDER!


Katie Wood

We are planning the next KACDL CLE classes and Board Meeting for May 21, 2004, 12:30 p.m., on the second floor meeting room of the new Kenton County Justice Center located at 230 Madison Ave., Covington, Kentucky (right across the street from Northern Kentucky Convention Center, one block from the Riverfront Hotel and entertainment district.)

The Presenters for Covington are as follows:
Bob Lotz
Dan Goyette
Marcus Carey

Membership fee's are as follows:

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Thoughts to Contemplate

I do not think much of a man who is not wiser today than he was yesterday.

— Abraham Lincoln

Injustice anywhere is a threat to justice everywhere.

— Martin Luther King

Progress, far from consisting in change, depends on retentiveness. Those who cannot remember the past are condemned to repeat it.

— George Santayana

You must do the things you think you cannot do.

— Eleanor Roosevelt